EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 8594

Vol 2058

United States Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellant and Cross-Appellee,

vs.

TWOHY BROTHERS COMPANY, a Corporation,

Appellee and Cross-Appellant.

Transcript of Record

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8594

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NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland Oregon,
For Twohy Brothers Company, Appellee and Appellant.

In the District Court of the United States for the District of Oregon.

No. L-10532.

TWOHY BROTHERS COMPANY,
a Corporation,

Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

CITATION.

To Twohy Brothers Company, a corporation, and to DeLancey C. Smith, Esq., and Messrs. McCamant, Thompson, King and Wood, its attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 30 days from the date hereof, pursuant to an appeal filed in the office of the United States District Court for the District of Oregon at Portland, Oregon, wherein Northern Pacific Railway Company, a corporation, is appellant, and Twohy Brothers Company, a corporation, is appellee, to show cause, if any, why the judgment rendered against said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Alger Fee, judge of the District Court of the United States for the District of Oregon, on this 19th day of May, 1937.

JAMES ALGER FEE,
Judge of said Court. [1*]

United States of America,
District of Oregon,
County of Multnomah—ss.

Due service of the within Citation is hereby accepted at Portland, Oregon, this 19th day of May, 1937 by receiving a copy thereof, duly certified to as such by Charles A. Hart of attorneys for Defendant.

W. LAIR THOMPSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1937. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Circuit Court of Appeals for the Ninth Circuit.

TWOHY BROTHERS COMPANY,
a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

CITATION ON APPEAL.

The United States of America to Northern Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, in said circuit on the 15th day of June, 1937, pursuant to a petition for appeal filed in the clerk's office of the District Court of the United States for the District of Oregon wherein Twohy Brothers Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellee as in the said petition for appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Alger Fee, District Judge of the United States at Portland within said circuit, this 20th day of May, A. D. 1937.

JAMES ALGER FEE,
United States District Court Judge. [3]

Due Service of the within Citation on Appeal is admitted this 20th day of May 1937.

C. A. HART,
Attorneys for Appellee.

[Endorsed]: Filed May 20, 1937. [4]

Be it remembered, That on the 4th day of February, 1929, there was duly filed in the District Court of the United States for the District of Oregon, a complaint in words and figures as follows, to wit: [5]

In the District Court of the United States for the District of Oregon,

L-10532.

TWOHY BROTHERS COMPANY,
a Corporation,
Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant.

COMPLAINT.

Comes now plaintiff, and for cause of action against defendant, complains and alleges:

I.

That plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the state of Oregon, and a citizen and resident of the State of Oregon.

II.

That defendant is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen and resident of the State of Wisconsin.

III.

That this action is one of a civil nature, is between citizens of different states and the amount in controversy exceeds the sum of Three Thousand and 00/100 ($3000.00) Dollars, exclusive of interest and costs, to wit: a sum in excess of Five Hundred Thousand Dollars ($500,000.00). [6]

IV.

That heretofore and on or about the 15th day of October, 1925 plaintiff and defendant entered into a written contract for the construction and completion by plaintiff for defendant of a line of railroad from Oro Fino to Headquarters, in the State of Idaho; said contract contained the following general description of the work to be done (the word Contractor therein used referring to plaintiff herein and the word Company the defendant herein):

"The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made a part of this contract the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Oro Fino to Headquarters in the State of Idaho.

"The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927."

That said contract also required plaintiff to fully complete said line of railroad for operation, to operate it after completion until the roadbed and track had settled, to maintain the line in good operating condition during that time, and finally, to readjust the track to line and grade, to go over all track bolts and tighten all track nuts, before the line would be accepted, and to operate said line before and after completion until it was turned over to and accepted by the Operating Department of the defendant.

V.

That said line of railroad extends through a rugged [7] and mountainous country, wild and inaccessible and remote from sources of labor and supplies. That the first twenty-six (26) miles of said line of railroad is through the canyon formed by a mountain stream known as Oro Fino Creek, and was at the time plaintiff began construction of said line, almost without roads and extremely difficult of access. That in the winter seasons, there are heavy falls of rain and snow and great accumulations of ice along said canyon. That because of the nature of said country and the length and severity of the winters the work to be done under said contract could only be successfully and economically prosecuted if done under a carefully arranged program, and the work so co-ordinated as to permit the performance of all of the larger items of the work under favorable weather conditions.

VI.

That for the purpose of inducing plaintiff to enter into said contract, defendant furnished to plaintiff certain profiles which defendant represented to plaintiff contained approximate estimates of the materials to be excavated and moved by the plaintiff under said contract, said profiles showing that plaintiff would be called upon to handle approximately one Million Seventy-Eight Thousand and Ninety-Five (1,078,095) cubic yards of material in making cuts, fills and changes of channel of Oro Fino Creek, of which 708,000 cubic yards would

be solid rock, 144,875 cubic yards would be loose rock, and 225,220 cubic yards would be common earth. That relying upon said estimates as approximately correct, plaintiff was induced to make a bid naming prices per cubic yard on the various classes of material to be handled, basing said prices on its ability to handle nearly all of said material during [8] favorable seasons of the year and under favorable weather conditions.

That said profiles were grossly incorrect and misleading for said railroad as defendant required plaintiff to construct it; that in truth and in fact defendant required plaintiff to handle and move in carrying out said contract more than 2,057,575 cubic yards of material of which over 1,164,987 cubic yards were solid rock, 473,965 cubic yards were loose rock, over 149,078 cubic yards were hard pan, over 224,251 cubic yards were a spongy, sticky, conglomerate of boulders, clay and mica, much more expensive and much slower to handle than any of the other classifications, and 43,853 cubic yards were of common earth, or an increase of over ninety (90) per cent.

That because of the increased yardage which defendant required plaintiff to handle in carrying out said contract over and above the yardage that was represented to the plaintiff it would be required to handle, and the insistence of the defendant that said work be completed approximately on the schedule provided in said contract, it became and was necessary for plaintiff to perform a large part

of said work under extremely adverse weather conditions,—rain, snow, ice and slides—which would not have been necessary if the quantities to be handled had been even approximately as represented.

VII.

That in the original plans and profiles, no details were furnished as to the method of construction of the bridges on said line, of which there were fifty (50) over Oro Fino Creek in the first twenty-six (26) miles of said railroad; but it was represented to plaintiff by defendant that said bridges [9] would rest on concrete or rubble masonry pedestals or light concrete piers or rock cribs, and in the call for bids plaintiff was asked to bid on bridges resting on any one of the foregoing types of foundation and no other; and the bids submitted by plaintiff for doing said work were for any one of said types of bridge and no other. The construction of each unit of these various types of foundation could and normally would be performed as one operation, the excavation to be immediately followed by the pouring of the concrete or the filling of the rock cribs in each case above the level of high water which would be encountered at later seasons, and when the bridge crew was ready to place the superstructure, it would have these foundations above high water upon which to work.

That instead of adopting any of said standard methods of construction of said bridges, defendant,

while the work was in progress under said contract, adopted the unusual and expensive plan of resting said bridges on wooden mud sills beneath the bed of said Creek. By this plan, plaintiff was required to make excavations in the rocky bed of said creek, and to smooth and level the base of said excavations so as to make an exactly level surface on which to place said mud sills, which said excavations were many times as expensive to make as the excavations for any of the types of foundations on which plaintiff was asked to and did bid. When the mud sills were placed, plaintiff was required to weight them down with rocks to keep them level, and to protect them for months in the bed of said stream against recurring freshets, and against heaving due to the formation of ice. That when the bridge crews reached each bridge site to do the superstructure work, it was necessary by reason of said peculiar form of foundation, for them to do a [10] considerable part of their work under water. Holes had been bored in said mud sills in which to insert dowels and bolts to attach the uprights and cross members to the mudsills. These holes had to be located and cleaned out under water, and then the dowels which were attached to the posts had to be driven into the holes. In many cases, it was necessary for plaintiff to build new coffer dams, to try to keep the water out, but it was impossible to keep it out. That a majority of the bridges in said Oro Fino canyon were necessarily constructed in the dead of winter, for the

reasons hereinafter set out, and in such cases the bridge crews were forced to work in and under the icy waters of said creek, which were at said times at flood stage; all of which would have been unnecessary if any of the three types of bridge foundations upon which plaintiff bid had been adopted, and all of which resulted in large extra expense to plaintiff.

VIII.

That in accordance with an option reserved by defendant in said contract defendant directed that a major portion of said bridges be constructed of squared timber from the Pacific Coast, which timber was delivered to plaintiff at its material yard at Oro Fino. That the only practicable method of moving these timbers and other bridge materials to the bridge sites was on the rails as the track was laid, and the plaintiff was so directed to do by defendant. That because of the heavy over-run of yardage, especially in the lower end of said canyon, the track laying and consequently the bridge building program had to be fitted piecemeal into the grading program, to comply with the contract requirements for early completion. As a result, most of the track laying and bridge building were thrown into the dead of [11] winter and were carried on in rain, snow and ice, the track laying and bridge building gangs were compelled to be laid off repeatedly with resultant demoralization of forces, and in many instances it was necessary for plaintiff to drag by team or man power materials for

the bridges through and around uncompleted cuts and for long distances through said narrow canyon; and that by reason thereof, said track laying and bridge building were much more costly to plaintiff than would otherwise have been the case and were greatly delayed.

IX.

That the original plans and profiles submitted by defendant to plaintiff to induce plaintiff to enter into said contract called for 25 changes of the channel of said Oro Fino Creek, involving the excavation of 6800 cubic yards of solid rock, 42,500 cubic yards of loose rock, and 4500 cubic yards of earth. Said excavations were all light and shallow and easy and cheap to handle. In plaintiff's contract it was provided that the excavations for such channel changes should be paid for only as ordinary excavation and no separate price was provided for such excavations, but the same was included in the unit prices for excavation of various classes of material for the whole job.

That during the progress of the work, defendant increased the number of channel changes to be made by plaintiff by adding thirty-eight (38) new changes. By reason of said additional channel changes and the errors in said profiles, plaintiff was required to excavate for all of the channel changes 10,000 cubic yards of said spongy, sticky conglomerate of boulders, clay and mica, 68,184 cubic yards of solid rock, 89,879 cubic yards of loose rock, 3,886 cubic yards of hardpan, and 2,755 cubic yards of

earth, or an increase of over 223%. In addition, [12] many of said additional channel changes were wholly unlike the original twenty-five provided for in said contract, in this: that instead of requiring light and cheap excavations and calling for shallow channels, said new channel changes were in narrow and steep parts of the canyon and required deep cuts in solid rock and in swiftly running water, and were many times more expensive per cubic yard to handle than any of the 25 channel changes provided for in the original profiles.

That because of the delay to plaintiff's work caused by the huge over-run of yardage generally on the job, as previously alleged, the over-run of yardage on the channel changes, and the holding back of other work by the necessity for completing said difficult additional channel changes, a large part of the work of channel changing was thrown into the winter and was performed under winter conditions at greatly increased expense over what normally would have been encountered; and the whole of the work done under plaintiff's contract was hindered, delayed and made more expensive thereby.

X.

That said contract contained, among other provisions the following:

(The word "Company" refers to defendant.)

> "The Company reserves the right at any time to change in whole or in part, as it may seem expedient, the line and grade of the railroad

or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for 'extras' or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the chief engineer shall deem the change to have materially [13] affected the cost of doing the work, he shall determine the price to be paid, either above or below as the case may be, the prices herein provided, so as to do substantial justice between the parties."

XI.

That in order to perform said contract, plaintiff assembled forces and equipment to do said job expeditiously and economically, and laid out its plan of action upon which it commenced and would have prosecuted the work to completion well within the time limit specified in the contract without having to do much of the difficult work during the winter weather; but that because of said large increases in the amount of work to be done, especially the large increase in the yardage of material to be handled, the additional channel changes heretofore described, and the said changes in the plans for the bridges, the necessity thus created for performing a large part of the work in the dead of winter, all had the result of seriously interfering with and obstructing plaintiff's plan of operation, disorganizing its forces, and making it necessary to

perform a considerable part of said work piecemeal instead of performing the whole job as one continuous, connected operation.

XII.

That by reason of the matters and things hereinbefore set out, the cost of doing said work of constructing said line of railroad was materially affected and increased by more than Three Hundred Twenty-Six Thousand Seven Hundred Eighty-five ($326,785.00) Dollars. [Order May 21, 1936. G. H. M.]

XIII.

That plaintiff, during the progress of and at the conclusion of the job, brought to the attention of the Chief En- [14] gineer of the defendant said changes and increases and their effect upon the cost of the work as heretofore alleged, and demanded additional compensation therefor over and above the unit prices provided in the contract, in order to do substantial justice between the parties.

XIV.

That said Chief Engineer entertained said claim and determined that said changes and increases had materially affected the cost of doing said work but determined that the additional price to be paid therefor was only the sum of $80,000.00 less the sum of $20,000.00 made up of disputed bills submitted by defendant to plaintiff for car rental and demurrage; that said sum of $80,000.00 with or without said $20,000.00 deduction is and was wholly

insufficient to do substantial justice between the parties; that the cost to plaintiff of doing the work under said contract was increased by said changes and increases by more than the sum of $150,000.00 as heretofore alleged, and that the price to be paid plaintiff over and above the prices named in the contract so as to do substantial justice between the parties was and is the sum of $326,785.00. [Order May 21, 1936. G. H. M.]

XV.

That thereafter, said Chief Engineer of the defendant railroad company arbitrarily refused to give to plaintiff as part of the final estimate provided for in said contract even said allowance of $80,000.00 on said claims, or any part thereof, unless plaintiff would agree to relinquish its right to certain other payments due it under said contract, which plaintiff refused to do, and ever since said Chief Engineer has refused and he now refuses to make said or any allowance. That said refusal of defendant has been and is made solely to coerce plaintiff into abandoning [15] other rights given it by said contract and relinquishing other sums of money due it under said contract.

XVI.

That it was provided in said contract, among other things, as follows:

> "When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so maintained by the contractor until it is accepted by the Company for operation.

This contemplates a second adjustment of the track to line and grade, after it has settled under traffic."

"The line will not be accepted until it is fully completed."

"After the track has been in service and before acceptance of same, all bolts must be gone over again and have nuts turned up tight."

"Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service, and in the service of other contractors. The specified contract price per car mile to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site, and loaded car return to the operated lines of the Company."

XVII.

That for such handling of cars there was provided (under Item 72 of the Price for work mentioned in said contract) the following: [16]

"(72) Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site,

and loaded car return to the operated lines of the Company, per car mile,—$1.00."

XVIII.

Prior to and at the time of the execution of said contract it was apparent that considerable commercial business would be offered for transportation on said line of railroad prior to the time same was taken over by the defendant for operation; that in submitting its bid and making said contract with defendant plaintiff named prices for the handling of said commercial business which would result in a large profit to plaintiff on said item and relied upon the profit so to be received in naming prices on other items in its bid and in said contract and would have demanded higher prices on said other items except for the profit it anticipated from handling said commercial business; that plaintiff made preparations to handle said business as it might develop and was equipped to handle the same and did in fact handle a part thereof.

XIX.

That during the early summer of 1927 defendant, in violation of its contract with plaintiff, and over the protest of the plaintiff, did refuse to permit plaintiff to handle said business as it developed, and on July 17, 1927, forcibly took possession of the lower 29 miles of said railroad on which large offerings of commercial business were being made, and subsequently [17] of other portions of said

line, and did proceed to handle said commercial business itself, and did refuse to make any payments to plaintiff therefor.

XX.

That because of the matters and things hereinbefore alleged, defendant permitted plaintiff without objection to extend the time of completion of said railroad to January 1, 1928 at which time plaintiff had fully completed said railroad and the same was accepted by the defendant and turned over to defendant's Operating Department on said date.

XXI.

That between July 17, 1927 and January 1, 1928, defendant carried over said line commercial business to the extent of 7,874 cars a total of 443,184.7 car miles, all of which would have been handled by plaintiff except for defendant's forcible taking possession of said part of said railroad.

That plaintiff would have been required to expend for the reasonable expense of handling said commercial business an amount not exceeding One Hundred Fourteen Thousand Dollars ($114,000.00) and was entitled to receive, under the terms of its contract with plaintiff, at the rate of One Dollar ($1.00) per car mile for said business, the sum of Four Hundred Forty-Three Thousand One Hundred Eighty-Four and 70/100 ($443,184.70) Dollars, which would have left a net profit to plaintiff of Three Hundred Twenty-Nine Thousand One Hundred Eighty-Four and 70/100 ($329,184.70)

Dollars, all of which sum is now due and owing to plaintiff by defendant under said contract; and that no part thereof has ever been paid, although frequently demanded. That the Chief Engineer of defendant has at all times refused to include any sum of money whatever on this item, either in the monthly estimates or in a final estimate. [18]

XXII.

It was further provided in said contract between plaintiff and defendant in part as follows:

> "Timber and piles furnished by the Railroad Company for permanent or temporary work will be delivered by the Railroad Company at their material yard, and the contractor will be paid for hauling to the bridge site."

It is further provided, under Item 38 of the Schedule of Prices for Work, as follows:

> "(38) Hauling timber furnished by the Company, per 1000 F. B. M. per mile ..... $0.85 (By the expression F. B. M. the parties meant Feet Board measure).

XXIII.

In executing said contract in accordance with its terms, plaintiff hauled timber furnished by the Company in the amount of 3,331,683 board feet a total distance of 65,331.55 miles per 1000 F. B. M. for which at said contract price of $0.85, it should have been paid the sum of $55,531.82. That of said amount so payable to plaintiff under said contract, defendant has paid only the sum of $20,410.52, leaving a balance due and owing plaintiff from

defendant on this item of Thirty-Five Thousand One Hundred Twenty-One and 30/100 ($35,121.30) Dollars, no part of which sum has ever been paid, although frequently demanded.

XXIV.

That said contract provided, by Item 37 of the Schedule of Prices, as follows:

"(37) Hauling piles furnished by the Company per lineal foot per mile .....$0.02." [19]

XXV.

That this plaintiff, in executing said contract in accordance with its terms, hauled 19,158 lineal feet of piling furnished by the Company a total of 248,282.67 lineal foot miles, for which it was provided in the contract it should have been paid the sum of Four Thousand Nine Hundred Sixty-Five and 65/100 ($4,965.65) Dollars which sum it has frequently demanded from defendant on this item, but that defendant has paid no part thereof, except $660.90, leaving a balance due and owing to plaintiff from defendant on this item of Four Thousand Three Hundred and Five and 16/100 ($4,305.16) Dollars.

XXVI.

That said contract also provided that plaintiff should be paid for hauling metal fastenings at the rate of $0.65 per ton per mile.

That in executing said contract in accordance with its terms, plaintiff hauled metal fastenings to the extent of 3,861.68 ton miles, for which said

contract provided it was to be paid at said rate of $0.65 per ton mile, making a total of Two Thousand, Five Hundred Fifteen and 29/100 ($2,515.29) Dollars.

That defendant has not paid any part thereof except the sum of $1,215.51 leaving a balance still due and owing from defendant to plaintiff on this item of One Thousand, Two Hundred Ninety-Nine and 78/100 ($1,299.78) Dollars, which sum though frequently demanded, has never been paid.

XXVII.

That in addition to the matters and things hereinbefore set out there is still due and owing plaintiff from defendant for work done under said contract according to defendant's own [20] figures the sum of $26,938.03, no part of which has ever been paid, though frequently demanded by plaintiff. That said sum is made up of balances due on numerous items of work, and it is impossible to allocate any part of same to any particular item or items of the work done.

XXVIII.

It is further provided in said contract, in part, as follows:

> "When in the opinion of the Chief Engineer this contract shall have been performed, he shall so certify in writing, and give a final estimate and statement of the balance unpaid; and the Company within thirty (30) days thereafter will pay the full balance."

XXIX.

That said contract was fully performed by plaintiff, and said line of railroad completed prior to January 1, 1928; that the Chief Engineer of defendant accepted said railroad line as complete and caused plaintiff to turn said railroad over to the Operating Department of the defendant on January 1, 1928; but that said Chief Engineer has ever since arbitrarily neglected and refused to give a final estimate and statement of the balance due plaintiff and unpaid, and has arbitrarily refused and continues to refuse to make a final estimate showing any sum of money whatever due from defendant to plaintiff for any of the materials and things heretofore referred to in this complaint; that the sums of money due plaintiff from defendant, as hereinbefore alleged, were due not later than thirty (30) days after January 1, 1928. [21]

Wherefore, plaintiff demands judgment against defendant for the sum of Six Hundred Ninety-One Thousand Eight Hundred Seventy-four and 66/100 ($691,874.66) Dollars, with interest thereon at the rate of six per cent per annum from February 1, 1928, until paid, and for plaintiff's costs and disbursements in this action.

[Order May 21, 1936. G. H. M.]

GARRECHT & TWOHY,
WILSON, REILLY & ISAACS,
Attorneys for Plaintiff.

United States of America
District of Oregon—ss.
State of Oregon
County of Multnomah—ss.

James F. Twohy, being first duly sworn, deposes and says: that he is Secretary of Twohy Brothers Company, the corporation plaintiff within named; that he has read the foregoing complaint, knows the contents thereof, and the same is true.

JAMES F. TWOHY.

Subscribed and sworn to before me this 2nd day of February, 1929.

[Seal] JOHN F. REILLY,
Notary Public for Oregon.

My Commission Expires: Dec. 5, 1930.

[Endorsed]: Filed February 4, 1929. [22]

And Afterwards, to wit, on the 4th day of February, 1929, there was issued out of said Court, a summons which with the return of service thereon, is in words and figures, as follows, to wit: [23]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon—ss:

I hereby certify and return that I served the annexed Summons & Complaint on the thereinnamed Northern Pacific Ry. Co., a corporation, Room 531 American Bank Bldg., by handing to and leaving a true and correct copy thereof with A. D. Charlton, Gen. Passenger Agent of said Co. per-

sonally at Portland in said District on the 4th day of Feb., A. D. 1929.

CLARENCE R. HOTCHKISS,
U. S. Marshal.
By JOE VOGELSANG,
Deputy. [24]

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America
To Northern Pacific Railway Company, a corporation, the above named defendant—Greeting:

You are hereby commanded to be and appear in the above-entitled Court, holden at the city of Portland, in said District, and answer the complaint filed against you in the above-entitled action, within 10 days from the date of the service of this Summons upon you, if served within the county of Multnomah, in said District, or if served within any other county of said District, then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of Five Hundred Forty Six Thousand Eight Hundred Forty-eight and 97/100 Dollars ($546,-848.97) with interest thereon at the rate of six per cent per annum from February 1, 1928, until paid, and for plaintiff's costs and disbursements in this action.

And this is to command you, the Marshal of said District, or your Deputy, to make due service and return of this Summons.

Hereof fail not.

Witness the Honorable Robert S. Bean and the Honorable John H. McNary, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 4th day of February, 1929.

G. H. MARSH, Clerk.
By F. L. BUCK,
Chief Deputy Clerk.

[Endorsed]: Returned and filed February 6, 1929. [25]

And afterwards, to wit, on the 30th day of March, 1929, there was duly filed in said Court, an answer in words and figures as follows, to wit: [26]

[Title of Court and Cause.]

ANSWER.

Now comes defendant and answers the complaint herein as follows:

I.

Defendant admits that plaintiff is an Oregon corporation as stated in paragraph I of the complaint.

II.

Defendant admits that defendant is a Wisconsin corporation as stated in paragraph II of the complaint.

III.

Defendant admits that this action is one of a civil nature between citizens of different states, and that the amount in dispute exceeds the sum of $3,000.00, exclusive of interest and costs.

IV.

Defendant admits that on October 15, 1925, a contract was entered into between plaintiff and defendant for the construction of a line of railroad from Orofino to Headquarters, in the State of Idaho, and admits that the work to be done was [27] described generally as alleged in paragraph IV of the complaint. A true copy of the contract so entered into between the parties is hereto annexed, marked Exhibit A. Except as herein admitted, defendant denies each and every allegation of paragraph IV of the complaint.

V.

Defendant admits that portions of the railroad to be constructed were located in mountainous country, accessible in part only by roads or highways. Defendant also admits that the first twenty-six miles of the line were located along the stream known as Orofino Creek, and that in winter seasons in this locality there are heavy falls of snow and rain. Except as so admitted, defendant denies each and every allegation of paragraph V of the complaint.

VI.

Defendant denies each and every allegation of paragraph VI of the complaint. Defendant made no representations to plaintiff concerning the amount of yardage of materials to be excavated in the construction work, but, on the contrary, furnished to plaintiff and to other contractors desiring to bid for the construction work, such information as defendant had been able to obtain as the result

of location surveys and preliminary examinations of the route of the proposed line. The yardage figures included in the data furnished to plaintiff and other bidders were not designed to show how much material the contractor would be called upon to excavate. Profiles and maps were furnished to plaintiff and other bidders to show the location of the line and the cuts which were to be made, and the yardage figures shown were based upon an arbitrary slope line, and, as plaintiff well knew, the slope [28] line for each cut and the amount of yardage to be removed therefrom could only be determined when the cuts were actually made and the exact character of the material therein ascertained. Plaintiff in making its bid and in contracting with defendant did not act in reliance upon any representation as to the amount of yardage, but undertook to remove, for compensation based upon a specified price per yard, such amounts of material as would be necessary to complete the cuts with slopes such that slides of material would be avoided.

Defendant admits that the amount of yardage actually removed in the construction work was substantially greater than that shown in the preliminary information furnished plaintiff and other bidders, but defendant alleges that plaintiff entered into the contract with defendant solely on its own knowledge and on information derived from others than the defendant, respecting the nature and formation of the country in which the work was to be done, and the character, quantities and location of the material required to be removed or to be used in

the roadbed of the proposed line of railroad; and the increase of yardage described in the complaint imposed no additional burden on plaintiff not contemplated by the contract.

VII.

Defendant denies each and every allegation of paragraph VII of the complaint and alleges the fact to be that plaintiff was specifically notified prior to the execution of the contract that the type of bridges and method of construction had not then been determined, but that in many instances temporary construction would be required in order to [29] expedite tracklaying; and there was furnished to plaintiff and other bidders, prior to the execution of the contract, defendant's standard plans for bridge construction, in general accordance with which said bridges were in fact constructed.

Thereafter, and following conferences between defendant's engineers and representativs of plaintiff, a definite plan for bridge construction was agreed upon and plaintiff was directed by defendant to proceed at once during the summer season of 1926 to carry out the program agreed upon. Notwithstanding such agreement and such direction, plaintiff failed to organize its work and permitted the entire summer season of 1926 to pass without prosecuting the bridge work continuously, and such difficulties as plaintiff encountered in the performance of the bridge work resulted from its failure to

proceed promptly and expeditiously during the low water period in the summer season of 1926.

VIII.

Defendant denies that all of the bridges on said railroad were required to be constructed of squared timber from the Pacific Coast, delivered to plaintiff at its material yard at Orofino, and alleges the fact to be that a considerable number of said bridges were constructed, with the consent of defendant, out of round timber procured locally. Defendant further denies that plaintiff was necessarily required to delay moving bridge timbers and materials to the bridge sites until track was laid up to such bridge sites, and alleges the fact to be that under the terms of the contract plaintiff was required to construct the bridges ahead of the track in all cases, subject only to the limitation that plaintiff would be permitted to haul bridge materials by team, and to charge defendant the team haul rate therefor for a maximum distance of four miles, except by special permission of the Chief Engineer of defendant.

Except as herein admitted, defendant denies each and every allegation of paragraph VIII of the complaint and alleges the fact to be that at or near the time of commencement of the bridge work, plaintiff and defendant jointly developed and adopted a program for bridge construction which provided for the use of local timber to a substantial extent, and which contemplated the use of the newly laid track for rail haul of materials as far as might be found practicable. Defendant further alleges that regard-

less of the amount of yardage to be moved, it was necessary to fit the tracklaying program and the bridge building program piecemeal into the grading program and to do a substantial amount of the bridge construction work in the winter season.

IX.

Defendant admits that as the work progressed changes were made by defendant in accordance with its reserved right, which reduced the number of crossings of Orofino Creek and correspondingly increased the number of changes of the channel of the stream. Except as so admitted, defendant denies each and every allegation of paragraph IX of the complaint and alleges the fact to be that such changes of line and changes of channel of the stream did not impose any additional burden on plaintiff not contemplated by the contract, but, on the contrary, in large part lessened the difficulties of the construction work because of the substantial reduction in the [30] number of bridges to be constructed.

X.

Defendant admits the allegations of paragraph X of the complaint with reference to the reserved right of defendant to make changes in the work.

XI.

Defendant denies that plaintiff assembled forces and equipment to do the work contracted for expeditiously and economically, and denies that the increases of yardage over the amounts shown in the

data originally submitted to plaintiff, or the increase in channel changes or in the changes in the plans for bridges, in any manner operated to prevent the expeditious and economical conduct of the work; and defendant denies each and every allegation of paragraph XI of the complaint.

XII.

Defendant denies each and every allegation of paragraph XII of the complaint.

XIII.

Defendant denies each and every allegation of paragraph XIII of the complaint. Plaintiff made no demand at any time for an increase in the unit prices based upon changes supposed to have materially affected the cost of doing the work.

XIV.

Defendant denies each and every allegation of paragraph XIV of the complaint. At no time did the Chief Engineer of defendant determine that any changes made by defendant under its reserved right had materially affected the cost of doing the work, nor did said Chief Engineer at any time de- [31] termine that plaintiff was entitled to $80,000.00 additional compensation by reason of any such changes. Defendant alleges the fact to be that several months after all work had ceased and after defendant had submitted to plaintiff a final estimate showing the balance finally due to plaintiff, there were negotiations between plaintiff and defendant for a complete settlement between them. Plaintiff

had theretofore made claims for additional compensation and defendant had declined to entertain said claims. During the negotiations which followed and in the month of June, 1928, defendant offered to pay plaintiff the sum of $80,000.00, less $20,000.00 owing to defendant for car rental and demurrage, in full settlement of all matters in dispute between plaintiff and defendant. Said offer was made to an officer of plaintiff who received same and considered it solely as an offer of complete settlement, and plaintiff well knew and understood that the offer was a proposal for a compromise settlement and was not an allowance proposed to be made because of supposed changes in the quantity, location or nature of the work contracted for.

XV.

Defendant denies each and every allegation of paragraph XV of the complaint and alleges the facts to be as stated in the defendant's answer to paragraph XIV of the complaint.

XVI.

Defendant admits that the specifications attached to and made a part of the contract between the parties included the clause quoted in paragraph XVI of the complaint.

XVII.

Defendant admits that the schedule of prices attached [32] to and made a part of the contract between the parties included the item quoted in paragraph XVII of the complaint.

XVIII.

Defendant denies each and every allegation of paragraph XVIII of the complaint. In submitting a bid and in making said contract with the defendant, plaintiff well knew that no substantial volume of commercial business would be turned over to it for handling in its work trains. Plaintiff thoroughly understood that defendant did not contemplate engaging in the transportation of any substantial volume of commercial business after the time of tracklaying and before final completion of the railroad, at any transportation rate which shippers could afford to pay, with any purpose of calling upon plaintiff to haul the cars transporting such commercial business at a rate of $1.00 per car mile. On the contrary, plaintiff in submitting its bid and in making the contract with defendant well knew that the commercial business which it might be called upon to transport included only occasional cars which the defendant might desire to have transported and which the plaintiff would be required to haul in its work trains.

XIX.

Defendant admits that in the early summer of 1927 defendant engaged in the transportation of logs upon the first twenty-nine miles of the railroad under construction; and defendant admits that it refused to make any payments to plaintiff because of such transportation. Except as so admitted, defendant denies each and every allegation of paragraph XIX of the complaint and alleges the fact

to be that on July 16, 1927, defendant, pursuant to its reserved right [33] under the contract with plaintiff, relieved plaintiff of its obligation to perform further work upon the first twenty-nine miles of said railroad, and thereafter, pursuant to an agreement with an owner of timber, engaged in the transportation of logs on said portion of said railroad.

XX.

Defendant denies each and every allegation of of paragraph XX of the complaint and alleges the fact to be that plaintiff was unable to complete and did not complete that part of the railroad not taken over on January 16, 1927, until October 25, 1927, on which date plaintiff discontinued all work under the contract.

XXI.

Defendant admits that between July 16, 1927, and January 1, 1928, it engaged in the business of transporting carload shipments of logs on the first twenty-nine miles of said railroad. Except as so admitted, defendant denies each and every allegation of paragraph XXI of the complaint and alleges the fact to be that none of said shipments would have been accepted for transportation by defendant, and none would have been hauled by plaintiff for defendant as commercial business at the rate of $1.00 per car mile, if defendant had not relieved plaintiff of its obligation to complete the first twenty-nine miles of said railroad, and if plaintiff had continued in charge thereof after July 16, 1927, and until the time of final completion.

XXII.

Defendant admits that the specifications and schedule of prices forming a part of the contract between plaintiff and defendant included the items quoted in paragraph XXII of [34] complaint.

XXIII.

Defendant admits that it has paid plaintiff the sum of $20,410.52 as compensation for the hauling of timber under the provisions of the contract quoted in paragraph XXII of the complaint. Except as so admitted, defendant denies each and every allegation of paragraph XXIII of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 85 cents per thousand F. B. M. per mile referred to in paragraph XXIII of the complaint for timber transported by team haul only, a maximum distance of four miles. Defendant further alleges that under the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the

Pacific Coast, which squared timber and other bridge materials were required to be transported from the material yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the authority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, [35] $1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXIV.

Defendant admits that the schedule of prices forming a part of the contract between plaintiff and defendant included the item quoted in paragraph XXIV of the complaint, providing the rate of 2 cents per lineal foot per mile for hauling piles.

XXV.

Defendant admits that it has paid plaintiff the sum of $660.90 as compensation for hauling piles under the provisions of the contract quoted in paragraph XXIV of the complaint. Except as so admitted, defendant denies each and every allegation of paragraph XXV of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 2 cents per lineal foot per

mile referred to in paragraph XXV of the complaint for piles transported by team haul only, a maximum distance of four miles. Defendant further alleges that under the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge [36] work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the Pacific Coast, which squared timber and other bridge materials were required to be transported from the mateiral yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the authority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, $1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXVI.

Defendant admits that the contract between plaintiff and defendant provided a price of 65 cents per ton per mile for hauling metal fastenings, and that defendant has paid plaintiff the sum of $1,215.51 as compensation for hauling metal fastenings pursuant to the contract. Except as so admitted, defendant denies each and every allegation of paragraph XXVI of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 65 cents per ton per mile referred to in paragraph XXVI of the complaint for metal fastenings transported by team haul only, a maximum distance of four miles. Defendant further alleges that under [37] the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the Pacific Coast, which squared timber and other bridge materials were required to be transported from the material yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the au-

thority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, $1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXVII.

Defendant denies that there is still due and owing plaintiff the sum of $26,938.03, as alleged in paragraph XXVII of the complaint, and alleges the fact to be that by reason of the many items of debit and credit to the account of plaintiff as a result of payments due on the one hand and advances [38] and allowances made by defendant on the other, it is impossible to determine without an accounting of all matters between plaintiff and defendant what, if any, sum now remains due plaintiff.

XXVIII.

Defendant admits that the contract between plaintiff and defendant included a provision for a final estimate quoted in paragraph XXVIII of the complaint.

XXIX.

Defendant denies each and every allegation of paragraph XXIX of the complaint and alleges the fact to be that a final estimate was duly and promptly prepared by the engineers of defendant but at the specific request of plaintiff was not

signed by the Chief Engineer of defendant nor formally tendered to plaintiff. At the conclusion of the work under said contract plaintiff made claim upon defendant for additional compensation and requested defendant to withhold its final estimate and to reserve final determination of the amount ultimately due plaintiff. For many months prior to the completion of the work defendant, at the request of plaintiff and to relieve the urgent necessities of plaintiff, had advanced large sums to plaintiff, and at the time of the completion of the work there was due from plaintiff to defendant by reason of such advances a sum substantially equal to the balance of compensation shown to be due plaintiff by the estimates of the engineers of defendant.

For its further and separate answer and its cross complaint in equity herein, defendant alleges: [39]

I.

Plaintiff is a corporation organized under the laws of the State of Oregon, and defendant is a corporation organized under the laws of the State of Wisconsin. This proceeding is one of a civil nature between citizens of different states, and the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

II.

On or about October 15, 1925, plaintiff and defendant entered into a contract in writing for the construction by plaintiff for defendant of a line of railroad from Orofino to Headquarters, in the State of Idaho. A copy of said contract is attached hereto,

marked Exhibit A. Pursuant to the terms of the contract as modified in the respects hereinafter stated, plaintiff engaged in the construction of said railroad during the years 1925, 1926 and 1927.

III.

Under the terms of said contract the defendant reserved the right to change the work contracted for in whole or in part, and to increase or diminish the amount of work to be done, to stop any part of the work or the whole thereof, or to require additional or extra work at any time. The terms of the contract also provided that all questions to arise therefrom, including any increase or decrease in the unit prices to be paid to plaintiff, any reclassification or special classification of materials excavated and the prices to be paid therefor, and any and all questions that might occur in relation to the provisions of the contract, the true intent and meaning thereof or the manner of performance, were to be left to the Chief Engineer of the defendant; [40] and said Chief Engineer was made the umpire to decide all such questions, and it was provided by the contract that his decision should be final and conclusive on the parties.

IV.

The construction of the railroad described in the contract between plaintiff and defendant contemplated and necessarily required adequate financing and careful and effective organization of the different branches of the work on the part of plaintiff, in

that the work contracted to be done involved a large amount of excavation and grading in a mountainous region as well as extensive bridge work, track construction and other work ordinarily included in railroad construction. And it was understood that plaintiff would sublet, and plaintiff did in fact sublet, substantially all of the work contracted for to a number of subcontractors, all of whose operations plaintiff undertook to supervise and finance.

Notwithstanding its obligation in this respect, plaintiff failed and neglected to provide adequate financing for the conduct of the work contracted for and failed to organize the work promptly and effectively, and as a result the entire construction work was constantly subjected to interruptions and delays which caused defendant great and unnecessary expense in the effort to insure the continuation of the work and its completion within the time required.

Because of the failure on the part of plaintiff to adequately finance and properly organize the work, plaintiff and its subcontractors in the latter part of the year 1926 became and were unable to continue the prosecution of the work. Plaintiff thereupon applied to defendant for additional [41] allowances and payments over and above those shown to be due by the current engineers' estimates, and represented that it could not continue in the performance of the contract without such additional payments and allowances; and defendant in order to avoid the cessation of work by plaintiff and to

insure the continuation of the work and the completion of the railroad within the time required, was forced to make and did make large additional allowances and payments to plaintiff on account of work done, but in excess of the sums due plaintiff upon the current monthly estimates of the engineers, and likewise was forced to assume and pay, and defendant did assume and pay, substantial items of cost and expense in connection with the construction of said railroad which it would not have been necessary to assume or pay if plaintiff had supplied adequate financing for and had properly organized the work contracted for.

The amounts so advanced and paid to plaintiff over and above the amounts due upon the monthly estimates, and the amounts so necessarily assumed and paid by defendant because of the default of plaintiff as aforesaid, comprise many items applicable to different branches of the work and a complete statement thereof cannot be made without an accounting of all matters between plaintiff and defendant, but defendant alleges the fact to be that the total amount of such additional allowances and payments, together with the items of cost and expense necessarily assumed and paid by defendant in connection with the grading work contracted for, exceeded the sum of $120,000.00, and such additional allowances and payments, together with such items of cost and expense in connection with the bridge work contracted for, exceeded the sum of [42] $23,000.00, and such additional payments and allowances, together with such items of cost and expense

in connection with track and ballast work and in the general performance of the contract, exceeded the sum of $58,000.00.

V.

Notwithstanding such additional allowances and payments and notwithstanding the assumption of such items of cost and expense as aforesaid, plaintiff in the month of April, 1927, became and was so heavily indebted to material and supply men and others with whom it had dealt in the performance of said contract, that it was impossible for plaintiff to continue work under said contract, and plaintiff became and was in default thereunder. By reason of such default defendant, in order to avoid cessation of the work and to insure its continuance and to insure the completion of the railroad within the time required, was thereupon forced to make additional advances to plaintiff over and above those made prior to that time as heretofore alleged. Thereupon and on the 26th day of April, 1927, plaintiff and defendant entered into a supplemental contract under the terms of which defendant undertook and agreed to advance for the account of plaintiff all sums necessary for the payment of bills owing by plaintiff for material and supplies actually put into the construction work. A copy of said supplemental contract is hereto annexed, marked Exhibit B.

VI.

Under the terms of said supplemental contract defendant from and after April 26, 1927, and con-

tinuing until the conclusion of all work by plaintiff under the original construction contract, advanced and paid all of the outstanding [43] bills of plaintiff covering items of material and supplies which had gone into the construction of said line of railroad, and applied the amounts thereafter ascertained to be due plaintiff as shown by the engineers' estimates, in reimbursement of the sums so advanced to pay bills of the plaintiff.

VII.

From time to time after April 26, 1927, and in accordance with said supplemental contract, defendant made advances to plaintiff and for its account in large sums in order to pay outstanding bills incurred by plaintiff in the prosecution of the work of constructing said railroad, and at the conclusion of the work the total amount so advanced by defendant, together with the amount theretofore advanced by defendant and assumed and paid by defendant, was greatly in excess of the amount due plaintiff as determined by the engineers' estimates. At the conclusion of the work a final estimate was duly and promptly prepared by the engineers of defendant showing the balance due plaintiff under the terms of the original contract, but not attempting to show the net amount due plaintiff after offsetting against said balance all prior advances and allowances made as hereinabove alleged. At the specific request of plaintiff said final estimate was not signed by the Chief Engineer of defendant nor formally tendered to plaintiff but was withheld be-

cause of plaintiff's request that the final determination of the amount ultimately due plaintiff be reserved. The determination of the Chief Engineer of defendant as to the amount due plaintiff for work done is final and conclusive upon plaintiff under the terms [44] of the contract, but the net amount due plaintiff, if any, cannot be determined until an accounting is had of all matters between plaintiff and defendant; and upon such accounting defendant is ready and willing to pay to plaintiff such sum as an accounting may show is finally due plaintiff.

VIII.

In the month of August, 1926, defendant exercised the right reserved to it under the terms of the original contract between plaintiff and defendant, to change the work contracted for and to stop a part thereof, and thereupon notified plaintiff that at once upon completion of tracklaying upon the first twenty-nine miles of track of said railroad, no further work would be required of plaintiff on that part of said railroad, and that defendant would take over and itself do such additional work as might be necessary for the completion thereof. And on or about July 16, 1927, defendant in accordance with said notice to plaintiff changed the work provided for by said contract and stopped a part thereof by taking over and it thereupon did take over and thereafter complete said first twenty-nine miles of the railroad referred to in the contract.

IX.

Prior to August 16, 1926, plaintiff objected to the proposed exercise of said reserved right and raised a question of defendant's right so to take over and complete the first twenty-nine miles of the railroad. The question thus raised was thereupon submitted to the Chief Engineer of defendant pursuant to the terms of the contract, and said Chief Engineer thereupon determined that under the terms of the contract defendant had the right so attempted to be [45] exercised. The decision so made became and is, under the provisions of the contract, final and conclusive upon plaintiff, and plaintiff at once assented to and acquiesced in said decision.

X.

Prior to August 21, 1926, plaintiff made demand upon defendant for compensation for hauling materials in work trains upon the said railroad as fast as track was laid on the following basis: Timber at 85 cents per thousand F. B. M. per mile, piles at 2 cents per lineal foot per mile, and metal fastenings at 65 cents per ton per mile. Defendant refused to accede thereto and notified plaintiff that said rates were applicable only to team haul and not to transportation in work trains on the newly constructed track. The question thus raised was thereupon submitted to the Chief Engineer of defendant pursuant to the terms of the contract, and said Chief Engineer thereupon determined that under the terms of the contract defendant had the right so attempted to be exercised. The decision so made

became and is, under the provisions of the contract, final and conclusive upon plaintiff, and plaintiff at once assented to and acquiesced in said decision.

XI.

The transactions between plaintiff and defendant in connection wtih the construction of the line of railroad under the contracts as hereinabove set forth, extend over a period in excess of two years and involve mutual running accounts embracing many thousands of items with total debits and credits in excess of three million dollars ($3,000,000.00), and it is and will be impossible to arrive at correct and [46] adequate determination of the state of such account at the present time or to determine what, if anything, is due plaintiff from dedefendant, or due defendant from plaintiff, as a result of said transactions, without a full and complete accounting had in accordance with the practice of this Honorable Court in causes of equitable cognizance. Defendant can have herein no plain, speedy or adequate remedy or defense at law and justice cannot be done between the parties hereto except by employing the methods of investigation peculiar to this Honorable Court upon the equity side thereof.

Wherefore, having fully answered, defendant prays that further proceedings at law upon the complaint of plaintiff be stayed, and that this cause be transferred to the equity side of the Honorable Court; that thereupon this Honorable Court require a full and complete accounting between the parties

hereto, and upon such accounting by its decree grant defendant judgment against said plaintiff in such amount as may thereby be established to be due said defendant from said plaintiff, together with its costs and disbursements herein to be taxed, and together with such other, further and different relief as defendant should in equity obtain, and this defendant will ever pray.

CHARLES A. HART,
L. B. DA PONTE,
CAREY AND KERR,
Attorneys for Defendant. [47]

State of Oregon
County of Multnomah—ss.

I, Charles A. Hart, being first duly sworn, depose and say: That I am one of defendant's attorneys in the above entitled cause; that I have read the foregoing answer and that the same is true as I verily believe.

I further depose and say that I make this verification on behalf of defendant for the reason that no officer or agent of defendant is present within the County of Multnomah or State of Oregon.

CHARLES A. HART.

Subscribed and sworn to before me this 30th day of March, 1929.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires: Aug. 28, 1931. [48]

Form 109-A General Contract. 10-7-24 1M RP

EXHIBIT "A"

Date.—Parties.

Agreement made the Fifteenth (15th) day of October A. D. 1925 between the Northern Pacific Railway Company hereinafter called the "Company" and Twohy Brothers Company of Spokane, Washington, hereinafter called the "Contractor."

Work.

The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made part of this contract, the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Oro Fino to Headquarters in the state of Idaho.

Date of Completion.

The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927.

Definition of Terms.

Where the word "Engineer" occurs in this contract or specifications attached hereto it refers to the Engineer of the Company in charge for the time being of the work of construction; and "Chief Engi-

neer" means the Chief Engineer of the Company from time to time.

Keep Crossings Open and Safe.

The Contractor will keep open and in safe condition for use all crossings and approaches wherever the railroad is crossed by, or is adjacent to, public or private roads, and will alter said roads and approaches whenever required by the Company's Engineer.

Local Regulations.

The Contractor shall obtain, at his own expense, all necessary permits and shall comply in all respects with any ordinances, laws or regulations of the general or local government properly applicable to the work.

Sub-Contracts.

The work shall be performed under the personal supervision of the Contractor and neither this contract or any interest therein shall be assigned, nor said work or any part thereof sub-contracted without the written consent of the Chief Engineer to every such assignment or sub-contract. [49]

Complying with instructions.

The Contractor in all things will conform to the instructions of the Engineer and his duly appointed assistants.

Lines, Levels and Marks.

All lines, levels and marks necessary for constructing the work in accordance with the plans and specifications will be furnished the Contractor by the Engineer.

The Contractor shall be solely responsible for the construction of the work in accordance with said lines, levels and marks, and for any disturbance or displacement of marks from their position as finally located by the Engineer.

Work when and where Directed.

The Contractor will carry on the work in such a manner and at such times and at such points as the Engineer from time to time shall direct, and all working plans and methods of carrying on the work shall be submitted in detail to the Engineer for his approval before proceeding with the work. Such approvals of the Engineer are understood to cover the general methods of procedure only and the Contractor shall have full control of his employes engaged upon the work and be solely responsible for all personal injuries caused in any manner by carrying on any work under this contract.

Remedy Faulty Work.

All imperfect or insufficient work or material shall be remedied immediately when pointed out and shall be made good and sufficient to the satisfaction of the Engineer, and omission by the Engineer to disapprove of or reject insufficient or imperfect work or material at the time of any monthly or other estimate shall not be deemed an acceptance of such work or material; and the Engineer shall have the power at all times to have defective work or material taken out and rebuilt or replaced at the expense of the Contractor.

The Contractor shall protect the Company against claims on account of patented devices or parts used by him on the work.

No Liquors—Disorderly Workmen.

The Contractor will not bring or permit to be brought anywhere on or near the work spirituous or other intoxicating liquors; and if any foreman, laborer or other employe of the Contractor or of any sub-contractor, shall be in the opinion of the Engineer intemperate, disorderly, incompetent, wilfully negligent or dishonest in performance of his duties, he shall be on request of the Engineer forthwith discharged; the Contractor will not employ nor permit to remain about the work any person who from said work or from any other part [50] of the Company's railroad may have been discharged for any of the causes mentioned in this paragraph.

Extra Work and Bills therefor.

No extra work or material is to be allowed or paid for, excepting that done or furnished in performance of a previous order in writing of the Engineer, and all claims for extra work or material must be presented to the Engineer for allowance at the close of the month in which the work shall have been done or material furnished, otherwise all claim therefor shall be deemed waived.

Arbitration.

To prevent disputes and misunderstandings between the parties and to provide for the speedy settlement of such as may occur in relation to the provisions of this agreement, or the true intent and meaning hereof, or the manner of performance by either party, the Chief Engineer of the Company is made the umpire to decide all such differences; he shall also decide the amount and quantity, character

and kind of work done and materials furnished by the Contractor, including all extra work and material; and his decision shall be final and conclusive on the parties.

Prices for Work.

The prices to be paid by the Company for the work are as follows:

(1)	Heavy Clearing, Per acre	$165.00
(2)	Clearing sage brush, greasewood and other brush, per acre	45.00
(3)	Cutting Isolated and dangerous trees, each	3.00
(4)	Grubbing, Per Acre	180.00
(5)	Common Excavation, per cu. yd.	0.38
(6)	Hard Pan, Per Cu. Yd.	0.55
(7)	Loose Rock, per Cu. Yd.	0.65
(8)	Solid Rock, Per Cu. Yd.	0.99
(9)	Solid Rock Borrow, per Cu. Yd.	0.99
(10)	Overhaul, per Cu. Yd. per each 100-Ft. beyond 500 Ft. Free Haul	0.02
(10A)	For Train haul grading Oro Fino Yard and Branch line connection—Flat price including haul up to two miles per Cu. Yd. (Railway Company to permit use of its existing trackage, furnish material for temporary tracks and water for locomotives) [51]	0.45
(11)	Corduroy, in place per cu. yd.	3.00
(12)	Loose Riprap, in place, from borrow, per cu. yd.	1.85

(13) Loose Riprap, in place, from Excavation, per Cu. Yd. 0.80

(14) Hand Placed Riprap, in place, including the paving of culverts, from Borrow, per Cu. Yd. 3.50

(15) Hand Placed Riprap, in place, including the paving of culverts, from Excavation, per cu. Yd. 2.50

(16) Dry Wall Protection work, in place at culvert ends, etc. from borrow, per Cu. Yd. 7.00

(17) Dry Wall protection work, in place at culvert ends, etc., from excavation, per cu. yd. 6.00

(18) Blind drains, in place, including brush top, per Cu. Yd. 3.50

(19) Driving Piles in protection work, per lineal foot above cut-off 0.18
(Railway Company to furnish piles).

(20) Driving Piles in protection work, per lineal foot below cut-off 0.32
(Railway Company to furnish piles).

(21) Driving piles in protection work, per lineal foot above cut-off 0.32
(Contractor to furnish cedar piles at the site of structure).

(22) Driving piles in protection work, per lineal foot below cut-off 0.44
(Contractor to furnish cedar piles at the site of structure).

(23) Furnishing, hauling and placing local round cedar logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed 0.32
(Railway Company to furnish metal fastenings). [52]

(24) Furnishing, hauling and placing local round pine logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed 0.30
(Railway Company to furnish metal Fastenings).

(25) Furnishing and placing rock in revetments and dykes, etc., per cubic yard in place 2.50

(26) Furnishing, hauling and placing brush, per cord in Place 16.00

(27) Placing sawed timber in culverts, including metal fastenings per thousand F. B. M. in place 13.50
(Railway Company to furnish timber and metal fastenings).

(28) Furnishing, hauling and placing sawed local timber in culverts, and placing metal fastenings, per thousand F. B. M. in place 38.00
(Railway Company to furnish metal fastenings).

(29) Furnishing, hauling and placing logs in culverts, and placing metal fastenings, per lineal foot of logs in place 0.28
(Railway Company to furnish metal fastenings).

(30) Placing 24″ concrete culvert pipe, per lineal foot of culvert in place 1.10
(Railway Company to furnish pipe)

(31) Placing 36″ concrete culvert pipe, per lineal foot of culvert in place 1.80
(Railway Company to furnish pipe)

(32) Placing 18″ corrugated iron culvert pipe, per lineal foot of culvert in place 0.60
(Railway Company to furnish pipe)

(33) Placing 24″ corrugated iron culvert pipe, per lineal foot of culvert in place 0.80
(Railway Company to furnish pipe)

(34) Placing 36″ corrugated iron culvert pipe, per lineal foot of culvert in place 1.10
(Ry. Co. to furnish Pipe) [53]

(35) Hauling for concrete pipe, per ton per mile 0.65

(36) Hauling for corrugated iron pipe, per ton per mile 0.85

(37) Hauling piles furnished by the Company, per lineal foot per mile 0.02

(38) Hauling Timber furnished by the Company, per thousand, F. B. M., per mile 0.85

(39) Hauling metal fastenings, per ton per Mile 0.65

(40) Hauling galvanized iron, per ton per Mile 0.65

(41) Hauling cement, per sack per mile 0.04

(42) Driving piles in trestles, bents, per lineal foot above cut-off 0.18
(Railway Company to furnish piles)

(43) Driving Piles in trestle bents, per lineal foot below cut-off 0.32
(Railway Company to furnish piles)

(44) Driving piles in trestle bents, per lineal foot above cut-off 0.32
(Contractor to furnish cedar piles at the site of structure)

(45) Driving piles in trestle bents, per lineal foot below cut-off 0.44
(Contractor to furnish cedar piles at the site of structure)

(46) Driving piles in trestle bents, per lineal foot above cut-off 0.32
(Contractor to furnish piles for temporary work at site of structure)

(47) Driving piles in trestle bents, per lineal foot below cut-off 0.44
(Contractor to furnish piles for temporary work at site of structure)

(48) Placing sawed timber in pile or frame trestles, including metal fastenings, per thousand F. B. M. in place 16.50
(Railway Company to furnish timber and metal fastenings) [54]

(49) Furnishing, hauling and placing sawed local timber in pile or frame trestles, and placing metal fastenings, per thousand F. B. M. in place 43.00
(Railway Company to furnish metal fastenings).

(50) Furnishing, hauling and placing round local timber in frame trestles, and placing metal fastenings, per lineal foot in place 0.50
(Railway Company to furnish metal fastenings)

(51) Furnishing, hauling and placing local round cedar timber in frame trestles, and placing metal fastenings, per lineal foot in place 0.53
(Railway Company to furnish metal fastenings)

(52) Placing galvanized iron fire protection on bridges, per pound in place 0.025
(Railway Company to furnish galvanized iron)

(53) Furnishing, hauling and placing local round cedar logs in pier cribs and placing metal fastenings, per lineal foot of logs placed 0.32
(Railway Company to furnish metal fastenings)

(54) Furnishing, hauling and placing local round pine logs in pier cribs, and placing metal fastenings, per lineal foot of logs placed 0.30
(Railway Company to furnish metal fastenings)

(55) Furnishing and placing rock in pier cribs, per cubic yard of rock in place 2.50

(56) Dry foundation excavation, common material, per cubic yard 0.60

(57) Dry foundation excavation, loose rock, per cubic yard 1.20

(58) Dry foundation excavation, solid rock, per cubic yard 2.00

[55]

(59) Wet foundation excavation, common material, per cubic yard 2.50

(60) Wet foundation excavation, loose rock, per cubic yard 3.50

(61) Wet foundation excavation, solid rock, per cubic yard 5.00

(62) Furnishing materials and placing concrete 1-3-5 Mixture in pedestals for support of frame bents, per cubic yard 22.50

(63) Furnishing materials and placing concrete 1-3-5 mixture in bridge piers, per cubic yard 20.00

(63a) Hauling concrete aggregates per ton per mile 0.60

(64) Furnishing materials and placing rubble masonry in pedestals and piers, per C. Yd. 17.50

(65) Tracklaying, including running surface, unloading and reloading material at material yard, transporting it to the front, curving rails, placing road crossing planks, track markers

and signs and reloading all surplus track material, per mile of track 1400.00
(Railway Company to furnish all material)

(66) Switches complete in place, each 120.00
(Railway Company to furnish material)

(67) Placing tie plates, per mile of track 250.00
(Railway Company to furnish material)

(68) Application of rail anchors, per anchor in place 0.03
(Railway Company to furnish material)

(69) Full earth surface, per mile of track 1200.00

(70) Loading, unloading and placing ballast under track and finishing to section when total lift is 8″ or less, per cubic yard 0.80

(71) Loading, unloading and placing ballast under track and finishing to section when total lift is over 8″ per cubic yard, said unit price to apply to the entire amount of ballast placed 0.80

[56]

(72) Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service

	of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile	$ 1.00
(73)	Handling cars of material in addition to contractor's own material and that covered by his contract, as required, from operated line set out track to material yard tracks for unloading, including all necessary switching and spotting, per car	10.00
(74)	Tunnel excavation for a net section of 377 square feet, including 500 foot free haul of excavated material, per lineal foot of tunnel	95.00
(75)	Tunnel excavation outside of 377 square feet net section, including 500 foot free haul of excavated materials, per Cu. yard	4.50
(76)	Placing sawed timber in permanent tunnel linings, including metal fastenings, per thousand F. B. M. in place	22.50
	(Railway Company to furnish timber and metal fastenings)	
(77)	Furnishing, hauling and placing sawed local timber and metal fastenings, in permanent tunnel linings, thousand F. B. M. in place	56.00

(78) Furnishing, hauling and placing hewed local timber and metal fastenings in permanent tunnel linings per thousand F. B. M. in place 56.00

[57]

Transportation.

The Railway Company will furnish free transportation over the line of the Northern Pacific Railway Company, subject to the review and instructions of the Chief Engineer as to the necessity for and proper use of same, as follows:

Passenger Transportation.

Passenger Transportation: (To be used only when traveling on business in connection with this contract).

1. For one member and one superintendent of the Contractor's firm or corporation, passes good on Northern Pacific System.

2. For Sub-contractors from any point on the Northern Pacific System to the Northern Pacific Railway station nearest the site of the work and return.

3. For foreman, and laborers, from any point on the Northern Pacific System to the Northern Pacific Railway station nearest the site of the work.

4. Return transportation will be furnished to such foremen and skilled labor as may remain until completion of the class of work on which employed, but no free return transportation will be granted for common laborers.

Freight Transportation.

Freight Transportation:

1. For all material to be used in the work (except as hereinafter provided) from any point on the Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work.

2. For tools, outfit and equipment used in the work from any point on the Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work and return to the point from which same were originally shipped to the work, or to any intermediate point on the line of the Railway Company. The right to such free return transportation must be exercised within ninety (90) days after the date of completion of the work, after which time no free transportation will be furnished.

3. The Contractor shall pay full tariff rates on all coal except blacksmith coal "sacked", boarding and commissary supplies, hay and grain, lumber for camps, powder and explosives, and shall buy all materials, if possible, at points which will permit the Company to receive the haul on same, routing same via the lines of the Company and its connecting lines. [58]

Transportation—General.

Exceptions may be made in the above stipulations covering passenger and freight transportation, and additional or other transportation may be furnished, as in the discretion of the Chief Engineer may be

found necessary for the proper handling of the work.

Demurrage Charges.

Nothing herein contained shall be construed to relieve the Contractor of payment of demurrage charges under Car Service Rules. Claims for cancellation or refund of demurrage on account of inclement weather, or for other reasons, shall be presented to the Engineer in charge of the work within fifteen (15) days after presentation of demurrage bills by the Company, and it is hereby agreed that no claim shall be presented after the expiration of the above time limit.

Price for extra work.

For extra work, or work done under written orders of the Engineer for which prices are not named herein, the Contractor shall be paid his actual outlay in such work and ten per cent additional.

Estimates—Payments.

Approximate estimates of the work done are to be made by the Engineer or his assistants at or about the end of each calendar month; and payment of the amount of each monthly estimate will be made by the Company on or about the twentieth day of the following month, less however all previous payments and less ten per cent of such estimate.

Retained percentage.

Ten per cent upon all monthly estimates shall be retained until, and as security for, complete performance of this contract.

Stopping work.

The Company at any time before completion may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof. On receiving such direction the Contractor shall stop work or diminish the force as directed, and shall have no claim whatsoever for damages by reason thereof, but shall receive payment for the work done in full discharge and satisfaction of all demands against the Company. Any notice given by the Company under this paragraph shall be in writing signed by the Chief Engineer, and shall be delivered to the Contractor or some person on the work representing him at least five (5) days prior to the required stoppage or reduction.

Accelerating work.

If at any time the Contractor shall not be in the opinion of the Chief Engineer progressing with the work as fast as necessary, or with sufficient force to insure its completion within the contract time, the Chief Engineer may direct the Contractor to put on such additional force and means as in his judgment are necessary, and on the failure of the Contractor to comply with such directions, the Chief [59] Engineer may declare this contract terminated; and in such case the amount of moneys then remaining unpaid including the percentage retained on all monthly estimates, shall be kept by the Company until the work is completed, and the Company may employ such force and means as in its judgment shall be necessary to complete the work and the cost thereof shall be paid by the Contractor.

Retained percentage forfeited.

Power to cancel contract.

If the Contractor at any time shall fail to perform any agreement herein contained the Company may cancel this contract; in which event the Contractor shall have no claim for damages, or for compensation for work done or material furnished, or for any portion of the percentage retained on monthly estimates; and the Company shall have the right to take possession of and hold the work done and material furnished and to retain all moneys which may be then unpaid.

Contractor to pay all laborers.

The Contractor will pay promptly all laborers and others in his employ as their pay falls due, and pay promptly as they fall due all bills for material and supplies going into the work, and in the event of his failure at any time to do so the Company may retain from subsequent estimates such amounts of money as the Chief Engineer may deem requisite to pay the laborers and all others employed on the work and the said supply and material bills. Before final settlement is made the Contractor shall furnish to the Company satisfactory evidence that the work is free and clear from all liens for labor or materials and that no claim exists out of which a lien may grow.

Contractor to pay damages to crops, etc.—Retention of claims from final estimate.

The Contractor assumes and agress to pay for all injury or damage to crops, fences, farm improve-

ments, or any other property caused by the prosecution of the work and all damages by fire started from the right of way, except damage to real estate made necessary by the work. When the final estimate is made, should there be any unsatisfied claim for such damage, the Company may deduct from the moneys owing the Contractor a sum equal to the amount so claimed together with the estimated cost of adjusting the claim. Such moneys shall be retained until all damages are satisfied when the remainder shall be paid over to the Contractor.

Temporary suspension.—Extension of time.

If the work be delayed materially from any act or neglect of any agent or employe of the Company, the time for completion shall be extended for a period equal to such delay and the Contractor shall have no further or other claim upon account of such delay. He must make claim to the Chief Engineer in writing for extension at the time of the delay, [60] stating the occasion and nature thereof, and failing to do so his right to extension shall be waived.

Total suspension.

In case of a total suspension of all work for over ninety days without any fault or procurement of the Contractor, unless such suspension shall have been caused by the winter season or protracted rigor of weather, the Chief Engineer shall make a final estimate and the amount so estimated shall be paid to the Contractor; he shall be entitled to receive only that proportion of the contract price which the

amount of work done and material furnished bears to the total amount covered by the contract.

Insurance.

Damage by fire to buildings or structures during construction will be made good by the Contractor, who will keep all structures fully insured until completion and acceptance by the Company. The cost of insurance will be divided equally between the parties, the policies written in the name of both, loss payable as their interest may appear, and deposited with the Chief Engineer.

Final estimate.—Time of payment of final estimate and retained percentage. Release.

When in the opinion of the Chief Engineer this contract shall have been performed, he shall so certify in writing and give a final estimate and statement of the balance unpaid; and the Company within thirty days thereafter will pay the full balance. The Contractor at final payment will execute, acknowledge and deliver to the Company under his hand and seal a valid discharge from all claims and demands growing out of or connected with this contract.

Contractor's base of information.

This contract is entered into by the Contractor solely on his own knowledge, and on information derived from others than the Company, its officers or agents, respecting the nature and formation of the country in which the work is to be done, and the character, quantities and location of the material required to be removed, or to be used in the roadbed.

Where borings or soundings for foundation of structures are indicated on the plans, it shall be understtod that this data has been obtained for guidance in the design of the structure, and the Company will assume no responsibility contingent upon the accuracy of the borings or soundings. [61]

Right reserved to change line of R. R. and the amount of work.

The Company reserves the right at any time to change in whole or part, as it may seem expedient, the line and grade of the railroad or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for "extras" or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the Chief Engineer shall deem the change to have materially affected the cost of doing the work, he shall determine the price to be paid, either above or below, as the case may be, the prices herein provided, so as to do substantial justice between the parties.

Execution.

In Witness Whereof, the Company has caused these presents to be signed by its duly authorized officer and the Contractor has hereunto set his hand and seal.

NORTHERN PACIFIC RAILWAY COMPANY

Witness as to the Company

By (Sgd.) H. E. STEVENS,
Chief Engineer.

(Signed) R. E. GEMMELL

(Seal) TWOHY BROTHERS COMPANY

(Seal) By (Sgd.) JAMES TWOHY, Secy.

Witness as to the Contractor

(Sgd.) M. S. BOSS. [62]

NORTHERN PACIFIC RAILWAY CO.
ORO FINO BRANCH
CONSTRUCTION
SPECIFICATIONS:

Part

1. Clearing, Grubbing, Grading and Pipe & Timber Culverts.
2. Tunnels.
3. Bridging.
4. Tracklaying and Surfacing. [63]

PART 1

SPECIFICATIONS FOR GRADING AND CONSTRUCTION OF PIPE AND TIMBER CULVERTS

CONTENTS

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(1) General.

Definitions.

1. The term "Company" as used herein refers in all cases to the Railway Company making the contract of which these specifications are a part.

2. The term "Contractor" as used herein refers in all cases to the persons, person's partnerships, or corporations engaged in the contract, of which these specifications are a part.

3. Wherever the word "Engineer" occurs in these specifications or in the contract attached hereto, it refers to the Engineer of the Company in charge for the time being of the work of construction; and "Chief Engineer" means the Chief Engineer of the Company.

Supervision of Work.

4. All work shall be done in a neat and workmanlike manner, and under the supervision of the Chief Engineer of the Company, and shall conform to these specifications, unless otherwise directed by the Chief Engineer.

Preliminary estimate and Classification.

5. Preliminary estimated quantities and classification, if shown on the profile, or furnished the Contractor, are approximate only and will in no way govern the final estimate. The Company reserves the right to increase or [65] diminish the approximate estimated quantities without affecting the contract unit prices for the various parts of the work except as provided in the contract.

Verification of Plans and Physical Conditions.

6. If the Contractor, in the course of the work, finds any discrepancy between the plans and the physical conditions of the locality, or any errors in plans or in the layout as given by said points and instructions, it shall be his duty to immediately inform the Engineer. Any work done after such discovery, until verified, shall be done at the Contractor's risk.

Defective Work.

7. Any omission to disapprove of work at the time of making any monthly or other estimate, will not be construed as an acceptance of any defective work, and the Contractor must remove and rebuild, or make good at his own cost, any work which the Engineer may consider to be defectively executed.

Red Lights at Crossings.

8. The Contractor shall, during the progress of the work, provide and put in place, red lights on each side of the track for highways across same at points where changes are made in roadway. These lights shall be in place and lighted between sunset and sunrise, and shall be continued until crossings and roadway have been put in good, passable condition and approved by the Engineer.

9. The Contractor shall at his expense keep all highway crossings and temporary detours in passable and safe condition at al times as directed by the Engineer in charge of the work and to the satisfaction of the Public Officials. [66]

Temporary Fences.

10. Previous to, or during the work of grading, the Contractor shall be required to erect and maintain such temporary fences as may be necessary to prevent trespass upon the Railway or damage to adjoining property.

Tote Roads.

11. No allowance or compensation whatever shall be due or paid to the Contractor for any tote roads,

trails, bridges or trestles incident thereto, he may construct to facilitate his work.

(2) Clearing and Grubbing.

Clearing.

12. As much ground included in the right of way as the Engineer in charge of the work may direct, shall be cleared of trees, logs, brush and rubbish, the work of clearing shall be kept at least 1000 feet in advance of grading.

Limits of Clearing.

13. The clearing will usually extend fifty (50) feet each side of the center line or of such width as may be directed by the Engineer. Any trees outside of that limit considered unsafe by the Engineer, shall be cut down and disposed of as other clearing.

Height of Stumps.

14. All trees, snags and old stumps outside the toe of slope but within the clearing limits must be cut so that tops of same shall not be over three (3) feet above surface of ground. All undergrowth and brush shall be close cut.

Merchantable Timber.

15. Usable logs and other wood shall, if so directed by the Engineer, be piled or skidded at designated locations. All other logs, limbs, wood, brush and other vegetable matter shall be removed from the ground or burned without injury to or endangering adjacent property. This burning [67] can only be done during certain months, and under the

instructions of the Fire Warden of the State of Idaho in whose district the work is being carried on. The Contractor shall inform himself of these regulations, and be governed accordingly. No stumps, logs, brush, or other refuse shall be placed on adjacent land, except by written directions of the Engineer, and after permit from property owner has been secured, nor shall same be dumped into any river or creek.

Removal of Debris.

16. From ground adjacent to excavation, all logs, loose stumps, roots, and brush must be thoroughly cleared, so they cannot fall or be washed into cuts or ditches, and so as to furnish ample space for any required drains or surface ditches at the sides of cuts.

17. From ground to be occupied by embankments, all trees, logs, brush, rubbish and other perishable matter shall be entirely removed.

Close Cutting.

18. Where embankments are to two (2) feet high, or more, and through station grounds, and shop grounds, all trees, stumps, and brush shall be cut off even with the surface of the ground and removed.

Grubbing.

19. Where embankments are to be two (2) feet or less in height, all stumps and large roots must be grubbed out and removed, but it will not be done where embankments are more than two feet high. [68]

Where required and Allowed.

20. Grubbing will be allowed and paid for only when the roadbed excavation is four (4) feet or less in depth, or embankment is two (2) feet or less in height. The cost of grubbing where roadbed excavation is more than four (4) feet deep, will be included in the price per yard for grading.

Grubbing in Borrow Pits.

21. Grubbing in borrow pits will not be paid for. The price per yard for borrow will include all necessary grubbing.

Units of Clearing and Grubbing.

22. Clearing and grubbing will be paid for by the acre or fraction thereof, and only for the surface where actually done.

Subgrade

(3) Roadbed.

23. The grade line on the profile denotes subgrade, and this term indicates the tops of the embankments, and bottom of excavations ready to receive the ballast.

Finished Roadbed.

24. When finished and properly settled, roadbed shall conform to the finishing stakes set for it by the Engineer.

Width of Slopes and Excavation at Profile Grade.

25. The width of the roadbed in earth excavation for single track shall be twenty (20) feet wide at profile grade, with slopes of one (1) horizontal to one (1) perpendicular, unless otherwise ordered by the Engineer. All cuts shall have side ditches

one (1) foot below sub-grade slopes and (1) to one (1).

26. The width of the roadbed in solid rock excavation for single track shall be eighteen (18) feet wide at the profile grade, with slopes of one (1) horizontal to four (4) per- [69] pendicular, or otherwise as said Engineer may direct. Solid rock cuts shall be excavated to the depth of one foot below the subgrade, and backfilled to subgrade with suitable material. Excavation pay quantities shall be the cross sectional area of the prism to a depth of one foot below subgrade only, regardless of overbreak or swell. Backfill will be measured and paid for as embankment.

Width and Slopes of Embankments at Profile Grade.

27. The width of roadbed on embankments for single track shall be sixteen (16) feet wide at profile grade. Side slopes shall be one and one-half (1½) horizontal to one (1) perpendicular, unless otherwise ordered by the Engineer.

Extra Widths.

28. For each additional main track, side or yard track, an additional width of embankment or excavation fourteen (14) feet, at profile grade shall be required.

Recross-Section of Cuts.

29. Where rock is encountered below the surface, the cut shall immediately be recross sectioned to rock slopes as indicated above and a berme of not less than four (4) feet shall be left between edge of

rock excavation and toe of slope of overlying earth. Where cut is so shallow, it is impossible to leave a four (4) foot berme, without changing slopes; the width of berme required may be reduced.

Intercepting Ditches.

30. Intercepting ditches shall be made at the top of the slopes of all earth cuts where the ground falls toward the top of the slopes, and they must diverge from the roadway sufficiently to prevent erosion of the adjoining embankment. The cross-section and location of such ditches shall be [70] designated by the Engineer, and if required by him, ditches shall be made in advance of opening the cutting.

31. Where required by the Engineer, Contractor shall construct ditches along the upper sides of all embankments, where no borrow pits have been excavated, in order to carry the surface water to the nearest water course. Material from all ditches shall be deposited in the embankment unless wasting is approved by the Engineer. The excavation specified in the ditches will be paid for at contract grading prices.

(4) Grading.

Definitions and General Requirements:

Work to be done.

32. Work to be done by the Contractor shall include all excavations and embankments required for the formation of the roadbed, including sidings, yard tracks and spurs, station and shop grounds; cutting all ditches and drains about or contiguous to the roadbed; all borrow pits, changing of streams,

other railways, roads and highways on or off the right of way; foundation pits for culverts, riprap, cribs, and bulkheads, and all other excavations in any way connected with, required for or incident to the construction of the railroad.

Spoil Banks.

33. At cuts where precaution against drifting snow must be taken, spoil banks shall be placed at such distance from the edge of the cuts, and in such formations as are suitable for snow protection, as the Engineer may direct.

Form and slopes of Excavation.

34. Slopes of all excavations shall be cut straight and true to the plane of the measured prisms; and all loose stones, [71] stumps and debris in the slopes must be removed.

Increasing Width of Cuts.

35. Wherever the Chief Engineer deems advisable, the Contractor will be permitted to increase the width of excavation at profile grade if necessary to do so to permit operation of grading equipment, slopes of such excavation to be steepened to maintain as closely as possible the profile cross-sectional area of the prism, but pay quantities shall be computed on basis of profile cross sections regardless of area excavated.

36. In case such increase in width of excavation is made on orders of the Engineer for any other purpose, the actual area excavated will be paid for at contract unit prices.

Disposition of Excavation.

37. All materials taken from excavations shall be deposited in the embankments except when directed otherwise by the Engineer.

38. When a cut contains material in excess of the amount required to make embankments between the limits of specified haul, such excess must be hauled and used to widen the banks equally on both sides of the center line within the limit of free haul, or otherwise wasted as directed.

Slips and Slides, Payment and Classification.

39. Material in slips, slides, and all overbreak extending beyond the slope lines will not be estimated nor paid for, unless in the judgment of the Engineer such slips, slides or overbreak were beyond the control of the Contractor and not preventable by the exercise of reasonable care and diligence and if allowed; will be classified in accordance with their condition at the time of removal regardless of prior conditions. [72]

Unauthorized work not to be paid for.

40. The Contractor will be paid only for such material as he is required and directed to excavate and dispose of. No payments will be made for material excavated outside of the limits of regular cuttings as staked out by the Engineer, nor for material deposited outside of the limits of required embankments, unless such work is done by direction of the Engineer, and then only at specified contract prices.

Use of Powder Limited.

41. The use or amount of powder in large blasts in seams, potholes, shaft or drift shots may be restricted by the Engineer.

42. Blasts shall not be so located as to disturb the material outside of the slope line of the cuts, especially in clay or hard pan cuts.

Removal of Deck of Temporary Trestles.

43. Where fills are made from temporary trestles, top of caps must be kept three (3) feet below sub-grade, and all caps, stringers, and crossties must be removed before filling is completed.

Embankments at Bridges, Culverts, Etc.

44. Where embankments are constructed over culverts, or where they are to abut against masonry, or trestle bridges; the earth forming such embankments shall be tamped or otherwise made as compact as possible as directed by the Engineer. If any structure be in any way injured or displaced in the construction of the roadbed, through negligence or improper methods of grading construction, used by the Contractor for grading, he shall bear the loss and shall make the same good at his sole cost. [73]

45. No embankment or fill shall be placed upon or against any culvert, wall or crib in such manner as to endanger its safety; or over or against any structure of masonry or concrete until the cement in the mortar or concrete has properly hardened and set as determined by the Engineer.

Perishable Materials.

46. Logs, stumps, brush, or other perishable material will not be allowed in embankments, and

sods will not be put in the central part of embankments less than five (5) feet high, except by permission of the Engineer.

Snow and Ice to be Removed.

47. The Contractor shall remove snow or ice from any portion of the work in any of its stages, whenever deemed necessary by the Engineer. Snow and ice removed on written orders of the Engineer shall be paid for as Extra work.

Corduroy.

48. In crossing bogs or swamps of unsound bottom, a special structure of logs and brushwood shall be furnished if required by the Engineer, the logs forming this foundation to be not less than six (6) inches in diameter at the small end. If necessary, there shall be two or more layers crossing each other at right angles, the logs of each layer being placed closely together, with broken joints and covered closely with brush; the bottom layer shall be placed transversely to the roadway and project at least five (5) feet beyond the slope-stakes of the embankment. Corduroy will be measured and paid for per cubic yard in place. [74]

Protection of Operated Property.

49. In the prosecution of work under this contract at or near an operated main track of any Railway Company everything must be subordinated to the same and uninterrupted operation of said main track, and nothing shall be done or suffered to be done by the Contractor, his agents, or employees, which will endanger or delay the trains on the operated tracks contiguous to the work.

(5) Classification.

Classes of Material.

50. Grading will be classified under the following heads: Solid Rock, Solid Rock Borrow, Loose Rock, Hard Pan, and Common Excavation.

Solid Rock.

51. Solid Rock shall include all rock occurring in masses of one cubic yard or more which both rings sharply when struck with a steel hand hammer and requires continuous blasting for economical removal.

Solid Rock Borrow.

52. Solid rock Borrow shall consist of Solid Rock, according to above classification excavated outside of the specified prism for use in filling out embankments.

Loose Rock.

53. Loose Rock shall include slate, hard shale, coal, soft sandstones, shell rock, solidly cemented gravel, and all other similar rocks when they do not have the properties required to qualify under solid rock.

54. Also, all detached rock or boulders containing one cubic foot or more, but less than one cubic yard each. [75]

Hard Pan.

55. Hard Pan shall include shales, indurated clay and other hard materials not loose or solid rock, that cannot, in the opinion of the Engineer, be reasonably plowed, on account of its own inherent hardness, by six good horses.

Isolated Strata.

56. Isolated strata of classified material occurring in a prism of common excavation will be included in the pay quantities only to the extent of the actual volume of such strata excavated.

Common Excavation.

57. Common Excavation shall include all material of every description not included in the foregoing or special classification.

Special Classification.

58. Special Classification may be established at the option of the Chief Engineer and with the consent of the Contractor when material in substantial quantities is encountered of such character that it cannot in his opinion be properly classified in any of the above defined classes.

59. Unit prices, for such material to be fixed by the Chief Engineer with due regard to prices stipulated in the contract for materials covered by contract classification.

Classification of Borrow.

60. Material borrowed for embankments will be classified strictly in accordance with the specifications, but no classification higher than Loose Rock will be allowed for such material unless with prior written authority of the Chief Engineer. [76]

(6) Haul.

Overhaul 500 to 2500 Feet.

61. The contract unit price per cubic yard for grading within limit of this class of haul shall in-

clude the actual haul for any distance not exceeding five hundred (500) feet. For any overhaul exceeding five hundred (500) feet free haul, the Contractor shall be paid per each one hundred (100) feet per cubic yard beyond five hundred (500) feet at the contract unit price for overhaul up to twenty-five hundred (2500) feet.

62. Overhaul shall apply only to material from cuts and borrow pits required to be hauled in one direction only and placed wholly within the 2500 foot extreme limit of overhaul. No material shall be required to be hauled beyond the 2500 foot extreme limit of overhaul, except on written orders of the Chief Engineer and at an agreed upon price.

63. Wherever required by the written order of the Engineer, the Contractor shall haul grading material across openings in the railway embankment not to be filled, and if a temporary bridge is required to be constructed by the Contractor for such purpose, it shall be paid for as Extra Work under the contract.

(7) Shrinkage.

Provision for Shrinkage.

64. Where it is necessary in the judgment of the Engineer to make allowance for future settlement of the embankments, either on account of their height, the character of the material of which they are built, the character of the material on which they are founded, or the manner in which the material is placed, the embankments shall be carried to such a height above subgrade and to such increased width of roadbed as the Engineer shall specify. [77]

(8) Borrow Pits.

Slopes and Drainage of.

65. The slopes or borrow pits along side of road-bed and right of way shall not be steeper than one (1) horizontal to one (1) perpendicular. If required, borrow pits shall be properly drained.

Bermes.

66. Bermes shall be left not less than six (6) feet between the foot of the slope of an embankment and the edge of an adjacent borrow pit; four (4) feet between the edge of every borrow pit and the boundary line of the Railway Company's land, and fifteen (15) feet between the edge of any regular cutting and the base of any spoil bank thereon.

Cross Bermes.

67. Where borrow pits are subject to overflow of high water, cross bermes shall be left and spaced as directed by the Engineer, and no additional allowance shall be made because of same.

Borrow not Permitted.

68. No material shall be borrowed from between the line of roadbed and an adjacent stream, where the natural surface is below highwater mark; and where it is above highwater mark no borrow pits shall be excavated to a depth below highwater mark, without written authority from the Engineer.

Borrow One Side Only.

69. Engineer may require borrow pits to be taken from one side of the road-bed only.

Borrowing below Grade.

70. Borrowing below profile grade, or wasting above profile grade shall not be done, on station or

shop grounds or sidings, except by the special permission of the Engineer. [78]

(9) Prices and Measurements of Grading Materials. Units and Terms of Payment.

71. All grading shall be measured and paid for by the cubic yard in excavation only, except where the shape or surface of borrow pits is too irregular to be measured correctly. In such cases the quantities may be measured in embankment, the Engineer making a just and reasonable adjustment for increase or decrease in bulk, if in his judgment there be any, so that the quantities allowed shall equal the quantities excavated from borrow pit as nearly as possible.

(10) Protection Work.

Riprap General.

72. Riprap shall consist of rough stones, laid or placed on the slopes of embankments, bank of streams, dykes, crib filling and paving, about foundations, at the ends of culverts or other masonry, or in any other place for the protection of roadbed or structures. It shall consist of three classes, loose, hand-placed, and dry walls, but no part of an embankment made from solid rock excavation shall be classed as riprap.

73. The ends of all rip rap protection shall be turned into the bank, so as to prevent its being undermined or washed out.

74. Care shall be taken to make a smooth connection between rip rap and the paving of culverts and masonry.

Loose Rip Rap.

75. Loose Rip Rap shall consist of stone of such kind and size as may be approved by the Engineer, and shall be deposited by throwing on the slopes in such location and to such heights and thickness as may be directed, although [79] some re-handling may be necessary for an even distribution. Loose rip rap shall be measured in excavation.

Hand Placed Rip Rap.

76. Hand Placed Rip Rap shall consist of selected stones of kind, shape and size approved by the Engineer, and shall be laid by hand to stakes on prepared slopes of such embankments as may be designated. Unit price for hand placed rip rap shall include cutting the slope to a true and uniform surface of two (2) horizontal to one (1) vertical. Care shall be taken that the large stones are placed at the bottom of the slopes (in an especially prepared trench if necessary) and such stones shall be laid as closely together as possible so as to avoid large openings. Each stone shall be so placed that it shall rest on the slope of the embankment, and not wholly on the stone below, and wherever so directed by the Engineer it shall be thoroughly rammed, driven or placed to form a surface as smooth and even as the shape and size of the stone will permit. Hand placed rip rap shall be measured in place.

Dry Wall.

77. Dry walls shall be composed of stones of such dimensions as the Engineer may deem suitable for

the work. They must be of fair shape and spalled enough so that they will lay with good and even bearings in the wall. In general, these walls shall be built of as large stones as may be available and stones shall be well bedded upon each other. All vertical joints shall be completely filled with earth and spalls and particular attention shall be paid to the securing of proper bond by means of long headers. Slope [80] and dry walls shall be measured in place.

Paving.

78. Paving shall be made of flat stones set upon their edges, in such manner as to leave the least possible space betwen them, and of such size as to reach through the entire depth of the paving.

79. Great care must be taken at the ends of any piece of paving to make it secure so that it cannot be undermined or cut out by water flowing through underneath it. The lower end must receive special care to prevent the earth next the pavement being gradually washed away and thus leaving the paving stones unsupported.

Blind Drains.

80. Blind drains shall be made of rough stone thrown in without particular order, except that the larger stones should be at the bottom. The top of drain should be covered with brush or sods. Care must be taken that the drain is made large enough to answer the purpose.

81. All stone for any kind of masonry must be acceptable to the Engineer, as to quality, kind and size, and also in the manner of laying it in the work.

Crib Work.

82. The material for cribs including piles when required, shall be cedar if available. If cedar is not available, other wood acceptable to the Engineer may be used. The bark must be wholly removed.

Size Logs in Cribs.

83. In size the logs may vary from ten to sixteen inches in diameter, but they must average at least 12 inches throughout the structure. They must be cut in lengths of twelve, twenty-four or thirty-six feet. In estimating pay [81] quantities in cribs, the logs in each course and all ties shall be measured as to length only, the varying thickness not being taken into consideration. Cribs shall be used wherever the Engineer may direct, and may also be used for reflecting or changing the channels of streams.

Piles.

84. Piles shall be cut from straight live, sound and thrifty trees, free from rotten knots, shakes or splits, not less than 10 inches in diameter at the top end, not less than 14 or more than 22 inches in diameter on the butt end.

Weight Hammer.

85. Piles shall be driven with a drop hammer weighing not less than 2500# or equivalent.

Penetration.

86. Piles shall be driven to a penetration satisfactory to the Engineer.

Cutting Off.

87. Contract unit prices for driving piling shall include cutting the piles off at the elevation designated by the Engineer.

Plans.

88. Crib framing shall conform to the detail plans furnished by the Railway Company.

Rock Filling.

89. Cribs shall preferably be filled with angular rock obtained from the excavation adjacent, and care must be taken to work the largest stone to the face. If however, no suitable material is found in the excavation it shall be obtained by borrowing. No extra allowance shall be made for filling cribs, unless it be for haul, except where the Engineer deems it necessary to borrow the material, in which case the work shall be classified and paid for as borrowed excavation. [82]

(11) Revetment Work—Dykes, Etc.

Rock.

90. The rock to be furnished shall be native nigger heads, field boulders or other rock acceptable to the Engineer, or sound durable material that will not disintegrate under the action of air or water. The rock to be in pieces weighing not less than 25 pounds nor more than 200 pounds. If available, rock from excavation shall be used, in which case no extra allowance shall be made for rock in revetment work, dykes, etc.; unless it be for haul. If, however, no suitable material is found in excavation, it shall

be obtained by borrowing, in which case it will be measured and paid for per cubic yard in place.

Brush.

91. Brush to be live bar growth willow, freshly cut, not less than one-half nor more than two inches in diameter at the butt and not less than 15 nor more than 30 feet in length. Brush to be neatly bound in bundles of convenient size for one man to handle. Each bundle to be tied with No. 18 annealed wire or stout cord. Brush to be inspected and measured by the Engineer at point of destination and paid for per cord in place.

Mattresses.

92. When above bundles of brush are required by the Engineer to be woven into mattresses, such work shall be paid for by force account.

Source of Material.

93. The Contractor may use such rock and brush as is available within the limits of the Railway Company's right of way and is not required for other purposes but he shall obtain permits for obtaining brush and rock off Railway Company's right of way. [83]

(12) Pipe and Timber Culverts.

Pipe.

94. Culvert pipe shall be of concrete or corrugated iron, as specified by the Engineer.

Concrete Pipe.

95. Concrete pipe will be furnished of an oval shape in sections eight (8) feet long and have bell

and spigot joints. It shall be placed with the long diameter in a vertical position.

Corrugated Pipe.

96. Corrugated pipe will be of the round section rivetted type, sections to be connected with bolted collars. The shipping length will be varied on the request of the Contractor to suit hauling conditions. It shall be properly laid and joints bolted, and shall be stayed and crowned by wedging in struts in accordance with plans, the struts not to be removed until directed by the Engineer.

Laying and Placing Culvert Pipe.

97. Whenever it is practicable, culvert pipe shall be so placed that the bottom of the pipe will have a firm bearing on stable natural ground for its entire length. Filling underneath parts of culvert will not be permitted. Great care is necessary to have the material well compacted under and against the sides of the pipe.

Backfilling.

98. When the natural bed of culvert is in solid rock or other very hard material, same shall be excavated one foot below the culvert grade and backfilled with sand or other suitable material. Where the Engineer considers backfilling as above specified unnecessary, but hard substances are encountered, the bottom of the trench shall be rounded to fit as nearly as possible the shape of the pipe, cutting depressions for the sockets, so that the lower surface of the pipe may rest evenly and solidly from end

to end on its bed. If the filling over the pipes is to be dumped from any height, the pipes shall first be covered with suitable material to prevent breaking from the impact.

Unstable Foundations.

99. When the foundation is unstable, same shall be prepared as may be directed by the Engineer to insure against settlement or breakage of the pipes; payment for culvert excavation, backfill and any special work to be made on the basis of the contract unit prices for the classes of material handled.

Laying Culvert Pipe.

100. The pipe in culverts shall in all cases be well and carefully laid to true line and grade with proper camber to take care of any future settlement, as staked out and directed by the Engineer, and when laid, suitable material, free from stones or other hard substances shall be carefully rammed under and on the sides of the pipes, and with the small or "spigot" ends of the pipes down stream. The joints must be well and carefully entered and connected.

Material to be delivered by the Railway Company and Unloaded and hauled by the Contractor.

101. All the material required for the construction of the pipe culverts on the work embraced in this contract will be delivered by the Railway Company free of cost to the contractor on cars, at the siding on the operated line of the Railway Company nearest the site of the work, as near as practicable

to the place where such material is to be used. The Contractor shall promptly unload such material from the cars when delivered to him, and shall haul such material to the site of the structure where it is to be used. [85]

Hauling Material in Special Cases.

102. If, however, the Engineer of the Railway Company shall deem the distance excessive which said material or any part of it would have to be hauled from the said point of delivery, he may require the Contractor to unload, pile, and store said material at said point of delivery, and afterwards to reload said material on cars to be transported to the end of track or other place to be selected by the Engineer, and there to again unload said material and to haul it to the site of the structure where it is to be used. The cost of unloading such material at the place where it is first delivered to the Contractor shall be included in the price for hauling said material as provided in the contract, but for reloading, handling and again unloading material which is not hauled directly from the original point of car delivery, and which is done by orders of the Engineer, the Contractor shall receive additional compensation at the contract unit prices covering this work, or if not specifically covered in the contract it shall be paid for as Extra Work.

Handling and Care of Material.

103. All pipe shall be carefully handled and shall be unloaded from cars and wagons with ropes and skids, and not be allowed to drop to the ground or

to roll down slopes or inclines without restraint. From the time of its delivery to him by the Railway Company until it is placed in the work and accepted by the Engineer, all material shall be considered as in charge of the Contractor, and he shall be responsible for its safe keeping.

Distance Hauled.

104. The contract unit prices to be paid the Contractor for hauling material shall be based on the distance which [86] said material is required to be hauled, measured on the nearest practicable route as determined by the Engineer.

Timber Culverts.

105. Timber culverts shall conform to the detail plans furnished by the Railway Company.

106. All culvert timber shall be fir or cedar if available. It shall be free from rot or other serious defects.

Measurement of Timber.

107. All timber shall be measured by the thousand feet board measure in the finished structure.

Log Culverts.

108. Log culverts shall conform to the detail plans of the Railway Company and shall be made of sound, straight, green logs, cedar if available, from which all bark shall be removed, not less than twelve (12) inches in diameter at the small end and of nearly uniform diameter throughout each course.

Measurement Logs.

109. Material in log culverts shall be paid for by the lineal foot, and the length of the logs in the completed structure only will be considered, without regard to varying size or thickness.

Syphons.

110. If any syphons are required, it is especially to be understood that all pipes in same shall be laid according to special plans and shall be paid for at special prices. [87]

PART 2

SPECIFICATIONS FOR TUNNELS

CONTENTS

Subject	Paragraph
Construction of Tunnels	1-4
Standard Plan of Single Track Tunnels	T-16-105

[88]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATIONS FOR THE CONSTRUCTION OF TUNNELS

Lining.

1. Tunnels cut through solid rock and which, in the judgment of the Engineer, are stable, will be unlined. Tunnels which require support shall be lined with timber.

Line Grade and Cross Sections.

2. Tunnels shall be excavated to the alignment, gradients and sections shown upon the plans, or to such modifications thereof as may be directed.

Section of Tunnel.

3. The section of tunnel, when completed, must conform closely to the dimensions shown by the plans, and will be estimated and paid for by the lineal foot. No allowance will be made for material taken out beyond the limits of the proper section.

Use of Explosives.

4. Blasting must be done with all possible care so as not to damage the roof and sides, and all insecure pieces of rock beyond the standard cross section shall be removed by the Contractor. The Contractor shall not use excessive charges of explosives and charges shall, in all cases, be the minimum amount of explosives for the work to be done; and no powder or explosives shall be stored or permitted to remain in the tunnel except as are actually used in the work of blasting. The Contractor shall take down, at his own cost, all loose or shattered rock or material of any kind, [89] which in the opinion of the Engineer, is dangerous or likely to become so in the future.

Price to Include.

5. The price paid for tunnel excavation shall embrace the cost of the removal of all materials between the outer faces of the portals, and shall include the loosening, loading, transportation and placing of the material in embankments or waste

banks, as directed; it shall also include whatever materials and labor are required for temporary props, supports and scaffolding for the safe prosecution of the work, as well as all expense of keeping the tunnel ventilated and free from water.

Additional Excavation for Timbering.

6. In case the material proves of such character as to require timbering or arching inside for support, the section will be increased to the size necessary for such timbering or arching. The additional excavation will be paid for by the cubic yard, according to the theoretical section.

Kind of Timber.

7. The timber used in the tunnel will be red or yellow fir, tamarack or white or yellow pine, as may be designated by the Engineer, and may be sawed or hewed, as found most convenient or desirable.

Quality of Timber.

8. The timber used for tunnel lining shall be cut from good, sound, live, straight and close grained timber, cut free from wane edges, square and true to size ordered, and must be free from large, loose or unsound knots, shakes, splits or large pitch seams or pitch pockets and knots in clusters, and must not show a sap angle on more than one [90] edge of a stick. It must in every way be acceptable to the Engineer.

Lagging.

9. The lagging shall be in pieces at least four inches thick and five inches wide.

Protection of Timbering.

10. The Contractor will be required to protect timber, when in place, from the effects of blasting, at his own cost, by covering with slabs or otherwise, as may be convenient. He will also be required to replace, at his own cost, any timber shattered or crushed in any stage of the work, by blasting or other operations of his own.

Estimating Timber.

11. The timber used for permanent lining of the tunnel will be estimated and paid for at a price per thousand feet B. M. of timber left in the completed structure, and the price paid per thousand feet will include the total cost of all labor incidental to putting the timber and iron in place.

Back Filling.

12. The Contractor must, at his own cost, fill in with stones, closely packed, to the satisfaction of the Engineer, any cavities resulting from any cause whatever, so that the roof and sides will, in all cases where required, have a direct and firm bearing on the lagging or lining.

Temporary Timbering.

13. All temporary timbering or shoring for roof or sides that may be necessary for the safe or convenient prosecution of the work in any of its stages, will be furnished and placed by the Contractor at his own expense.

Extra Material.

14. Any material taken from outside the proper dimensions shown on the general plans furnished,

must be removed from the tunnel and roadway without expense to the Company. [91]

Timber Portals.

15. Should the portals of the tunnel be built of timber, it will be estimated and paid for on the same basis as timber used in the tunnel lining.

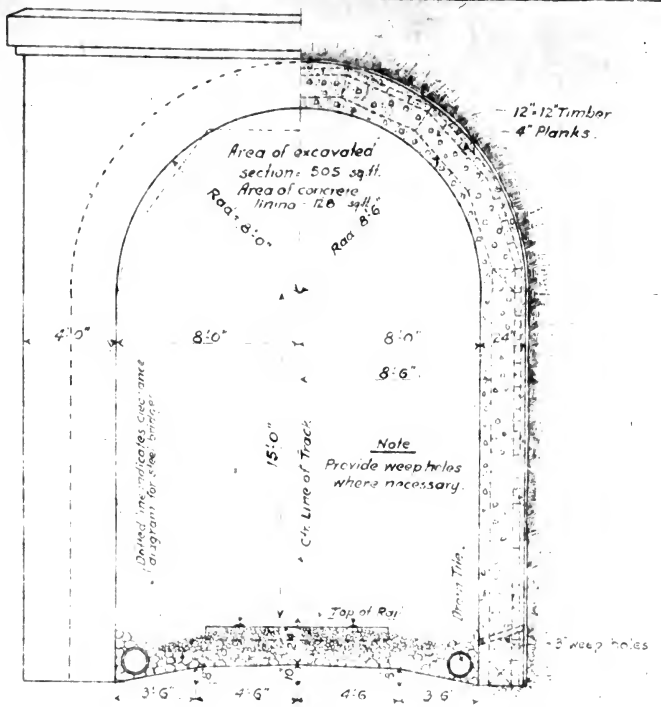
Plans to be Furnished.

16. Standard cross section of unlined tunnel on tangent will be sixteen feet wide at top of rail with circular arch sprung from a point fifteen feet above top of rail. Net cross sectional area approximately 377 square feet. Detail plans of tunnel and lining will be furnished by the Company.

Right to Vary Dimensions.

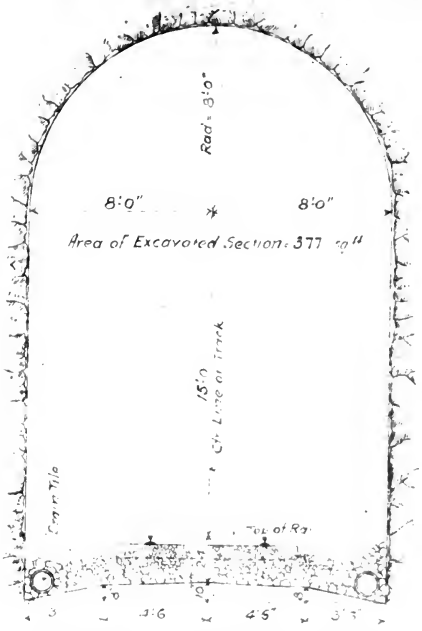
17. The right is reserved to vary the standard dimensions of the tunnel, should the Engineer deem it advisable. [92]

T-16-105



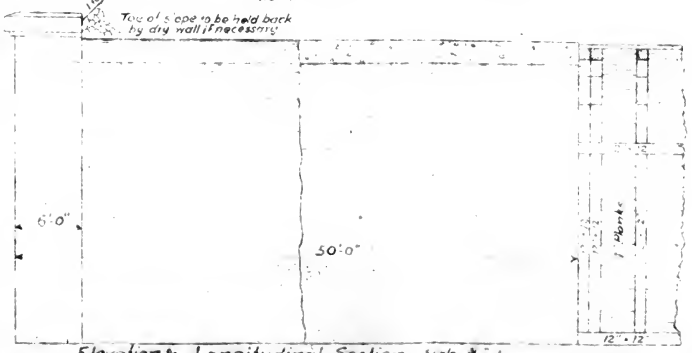
Half End View. Half Section for Soft Ground.

Scale 3/16" = 1'



Theoretical Section for Solid Rock

Scale 3/16" = 1'



Elevation & Longitudinal Section Scale 1/32" = 1'

N. P. Ry.

Standard Plan of Single Track Tunnels.

Scale 3/16" & 1/32" = 1'

Approved. July 12th 1910.

Chief Engineer. President.

Checked O.T. Drawn by S.A.

PART 3

SPECIFICATIONS FOR
BRIDGING
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[94]

During the construction of the line of railway, it may be considered advisable to aid in the progress of the work and permit the laying of track to construct all or a portion of any bridge of temporary work. The temporary work may be constructed of local timber and the specifications for "Sawed or Round Timber" or "Piling for Temporary Work" will apply to the material furnished.

Where the Contractor is required to furnish local timber, he will haul it to the bridge site and place it in the structure for the price bid.

Timber and piles furnished by the Railway Company for permanent or temporary work will be delivered by the Railway Company at their material yard and the Contractor will be paid for hauling to the bridge site. [95]

SPECIFICATIONS FOR THE CONSTRUCTION OF PILE AND FRAME TRESTLES AND BRIDGE PIERS AND ABUTMENTS.

(1) Pile and Frame Trestles

Work Included.

1. The Contractor shall build the complete trestle, or trestles, ready for the track rails, in a workmanlike manner, in strict accordance with the plans and specifications, to the satisfaction of the Engineer.

2. Bridges must be erected ahead of the track in all cases but the maximum team haul of materials shall not exceed four miles, except on written orders of the Engineer.

Material.

3. The material entering into the permanent structure shall conform to:

Specifications for Cedar Piles,

Specifications for Temporary and Foundation Piles,

Specifications for Timber,

Specifications for Metal Fastenings,

Specifications for Galvanized Iron, M-173-C,

Specifications for Cement, E-108.

Unloading & Handling, Material.

4. The Contractor shall unload all material furnished by the Company or by the Contractor. Material shall be properly stored at least six (6) feet from the nearest rail and any material furnished by the Company, lost or damaged in handling by the Contractor during the progress of the work, [96] shall be replaced by the Contractor at his expense, unless such loss or damage is plainly the fault of the Company. Material furnished by the Company which is received before the Contractor is on the ground will, if necessary to release cars, be unloaded by the Company in the nearest available material yard, and material unloaded by the Company shall be handled from the point where it is unloaded to the site of the work by the Contractor, without additional cost to the Company. All material held on cars or received after the Contractor is on the ground, shall be unloaded promptly by the Contractor at his expense.

Rental of Equipment.

5. On the request of the Contractor, the Company will furnish equipment to the Contractor, such as flat cars, box cars, bunk cars, etc. The Contractor shall repair all damage to such equipment furnished for his use and return it in as good condition as when he received it.

Rental rates for such equipment shall be as follows:

Water Cars	$1.00 per day
Caboose (8 wheel)	1.70 " "
Refrigerator Cars	1.30 " "
Box Cars	1.30 " "
Flat Cars	1.00 " "
Office, Bunk, Supply and Tool Cars	0.75 " "

Plant.

6. The Contractor shall furnish all necessary labor, tools, machinery, supplies, temporary staging and outfit required.

Driving Piles.

7. Piles shall be carefully selected to suit the place and ground where they are to be driven. When required by the Engineer, pile butts shall be banded with iron or steel for [97] driving, and the tips shod with suitable iron or steel shoes. Such shoes will be furnished by the Company.

8. Piles shall be driven to firm bearing, satisfactory to the Engineer.

9. Piles shall be driven by a steam or drop hammer. The weight of the drop hammer shall not be less than twenty-five hundred (2,500) pounds. Where soil conditions are favorable, jetting will be permitted, subject to the approval of the Engineer.

10. Batter piles shall be driven to the inclination shown by the plans.

11. Piles injured in driving, or driven out of place, shall either be pulled out or cut off and replaced by new piles.

Cutting off Piles.

12. The Contractor shall cut off files to the elevation given by the Engineer, without cost to the

Company. Piles shall be cut off square and trimmed so as not to leave any horizontal projection outside of the cap.

Framing and Placing Sawed Timber.

13. Framing shall be accurately fitted. No blocking or shimming will be allowed in making joints. Timbers shall be cut off with the saw. The use of an axe in cutting off timbers will not be permitted.

14. Caps and sills shall be sized and brought to a uniform thickness and even bearing on piles or posts. The side with most sap shall be placed downward.

15. Posts shall be sawed to proper length for their [98] position (vertical or batter), and to even bearing on cap and sill.

16. Sash and sway bracing shall be properly framed and securely fastened to piles or posts. When necessary, on account of the variation in size of piles of a bent, filling pieces shall be used or piles dapped as directed by the Engineer to permit proper alignment of the bracing. Longitudinal diagonal braces shall be properly framed and securely fastened to piles or posts. Girts shall be properly framed and securely fastened to caps, sub-sills, intermediate sills, posts or piles, as called for on the plans.

17. Stringers shall be sized to a uniform depth at supports. The edges with most sap shall be placed downward.

18. Ties will be sized to a uniform thickness at the mill and shall be placed with the rough side

upward. They shall be spaced regularly and cut to even length and line, as called for on the plans.

Guard Timbers.

19. Guard timbers shall be framed, laid to line and to a uniform top surface. They shall be firmly fastened to the ties, as called for on the plans.

20. Bulkheads shall be of sufficient dimensions to keep the embankment clear of the caps, stringers and ties, at the end bents of the trestle. The projecting ends of the bulkheads shall be sawed off to conform to the slope of the embankment. [99]

Framing & Placing Round Timber.

21. Temporary frame trestles constructed of round timbers may be used at locations designated by the Engineer, in order to lay track in advance of the permanent bridge construction. The framing and placing shall be made in a manner which will provide a stable and rigid structure.

22. Round timbers used as posts in permanent trestles shall be accurately framed and fastenings placed to conform to the Railway Company's plan of frame trestles.

Metal Fastenings.

23. Holes shall be bored for all bolts and dowels. The size of the holes shall be one sixteenth (1/16) inch less than the diameter of bolt or dowel to be placed. For drift bolts the depth of the hole shall be one inch less than the length of the bolt.

24. All fastenings shall be placed as called for on the plans.

Fireproofing.

25. Galvanized sheets shall be placed as called for on the plans.

Measurement of Timber.

26. All timber shall be measured by the thousand feet board measure for sawed timber and per lineal foot of log for round timber in the finished structure.

Excavation.

27. Excavation for frame trestle bents will be paid for as foundation excavation, as shown in the Company's specification E-109, "For the Construction of Bridge Masonry and Retaining Walls".

Concrete Pedestals.

28. The construction of concrete pedestals shall conform to the Railway Company specification No. E-109, "For the Construction of Bridge Masonry and Retaining Walls". [100]

Rubble Masonry, Walls, Pedestals & Piers.

29. Rubble Masonry shall be composed of stones of proper size and thickness for the dimensions of the work. They shall be of fair shape and spalled to provide a good even bearing in the wall. All stones shall be laid with full mortar beds and joints. All exposed faces shall be pointed. They shall be laid with headers properly spaced to make a good, substantial wall. No stones less than six inches in thickness shall be used and generally not less than eight inches. The tops of walls, pedestals or piers shall be finished to a true level.

Pier Cribs.

30. The material of which the cribs required for support and protection of timber bents or piers shall be built, will be cedar. The bark shall be removed.

31. The size of the logs may vary from ten to sixteen inches in diameter, but they must average at least twelve inches throughout the structure. They shall be cut to lengths shown on the plans.

32. In estimating the logs in cribs, each course and all ties shall be measured as to length only, the varying thickness not being taken into consideration.

33. Crib framing shall conform to the detail plans furnished by the Railway Company.

34. Cribs shall be filled with angular rock and care shall be taken to work the largest stones to the face. Pier crib filling will be paid for by the cubic yard measured in place. [101]

(2) Bridge Piers and Abutments

35. The Construction of piers and abutments shall conform to the Railway Company specification No. E-109. "For the Construction of Bridge Masonry and Retaining Walls". [102]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATION FOR METAL FASTENINGS USED IN PILE AND FRAME TRESTLES

(1) Material

Wrot Iron.

1. Wrought iron shall be double rolled, tough, fibrous and uniform in character. It shall be

thoroughly welded in rolling and be free from surface defects. When tested in specimens of the form of Fig. 1, or in full sized pieces of the same length, it shall show an ultimate strength of at least 50,000 pounds per square inch, an elongation of 18 percent in 8 inches, with fracture wholly fibrous. Specimens shall bend cold, with the fiber, through 135 degrees, without sign of fracture, around a pin the diameter of which is not over twice the thickness of the piece tested. When nicked and bent, the fracture shall show at least 90 percent fibrous.

Steel.

2. Steel shall be made by the open hearth process and shall be of uniform quality. It shall contain not more than 0.05 percent sulphur. If made by the acid process, it shall contain not more than 0.06 percent phosphorous; and if made by the basic process, not more than 0.04 percent phosphorous. When tested in specimens of the form of Fig. 1, or full sized pieces of the same length, it shall have a desired ultimate tensile strength of 60,000 pounds per square inch. [103]

within 5000 pounds of desired ultimate. It shall have a minimum percentage of elongation in 8 inches of

$$\frac{1{,}500{,}000}{\text{ultimate tensile strength}}$$

and shall bend cold without fracture 180 defrees flat. The fracture for tensile tests shall be silky.

CAST IRON

(3) Except where chilled iron is specified, castings shall be made of tough gray iron, with sulphur not over 0.10 per cent. They shall be true to pattern, out of wind and free from flaws and excessive shrinkage. If tests are demanded, they shall be made on the "Arbitration Bar" of the American Society for Testing Materials, which is a round bar 1¼ inches in diameter and 15 inches long. The transverse test shall be made on a supported length of 12 inches, with load at middle. The minimum breaking load so applied shall be 2900 pounds, with a deflection of at least 1/10 inch before rupture. [104]

(2) Workmanship

Bolts.

4. Bolts shall be of wrought iron or steel, made with square heads, standard size, the length of thread to be 2½ times the diameter of bolt. The nuts shall be made square, standard size, with thread fitting closely the thread of bolt. Threads shall be cut according to U. S. standards.

Drift Bolts.

5. Drift bolts shall be of wrought iron or steel, without head, pointed, as called for on plans.

Spikes.

6. Spikes shall be of wrought iron or steel, square or round, as called for on the plans. Steel wire spikes, when used for spiking planking, shall not be used in lengths more than 6 inches; if greater lengths are required, wrought or steel spikes shall be used.

Packing Spools or Separators.

7. Packing spools or separators shall be of cast iron, made to size and shape called for on plans. The diameter of hole shall be ⅛ inch larger than diameter of packing bolts.

Cast Washers.

8. Cast washers shall be of cast iron. The diameter shall be not less than 3½ times the diameter of bolt for which it is used, and its thickness equal to the diameter of bolt. The diameter of hole shall be ⅛ inch larger than the diameter of the bolt.

Wrought Washers.

9. Wrought washers shall be of wrought iron or steel, the diameter shall be not less than 3½ times the diameter of bolt for which it is used, and not less than ¼ inch thick. The hole shall be ⅛ inch larger than the diameter of the bolt. [105]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATIONS FOR TIMBER OF PILE AND FRAME TRESTLES

(1) Sawed Timber

Bridge Stringers.

1. Stringers shall be cut from good, sound, live, straight and close grained timber, cut free from

wane edges, square and true to sizes ordered, and must be free from splits, shakes and other defects, except pitch seams four to six inches in length, and sound, live knots, not more than two inches in diameter, and fibre of which must be interwoven with the fibre of the wood surrounding them. A piece with knots in clusters will not be accepted. To be inspected before loading.

Other Bridge Timber and Ties.

2. Timber shall be cut from good, sound, live, straight and close grained timber, cut free from wane edges, square and true to sizes ordered, and must be free from large, loose or unsound knots, shakes, splits, or large pitch seams or pitch pockets and knots in clusters, and must not show a sap angle on more than one edge of a stick. Subject to inspection before loading. Surfacing of bridge ties must be opposite the heart.

(2) Round Timber

Posts.

3. Posts in permanent trestles shall be of cedar and shall conform to the specifications for "Cedar Piles".

4. Posts in temporary trestles shall be of any sound timber, and shall conform to the specifications for "Tem- [106] porary and Foundation Piles".

Caps and Sills.

5. Timber shall be of Fir, Tamarack, Pine or other suitable wood.

6. Timber shall be cut from live, sound trees, free from defects, such as injurious ring shakes,

large and unsound or loose knots, decay or other defects which may materially impair their strength.

7. Each stick shall be straight, free from short bends and a line drawn from the center of each end shall not fall more than three inches from the center line of the stick.

8. The minimum diameter at the small end of the stick shall be not less than fourteen inches and the diameter at the large end shall be not less than nineteen inches or more than twenty-two inches.

[107]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATION FOR PILING FOR TEMPORARY AND FOUNDATION WORK

(1) Piles shall be of White Oak, Red Oak, Cedar, Fir, Tamarack, Sycamore, Gum, Maple, Elm, Hickory, Norway Pine, or any sound timber that will stand driving.

(2) Piles shall be cut from live, sound trees, free from defects, such as injurious ring shakes, large and unsound or loose knots, decay or other defects which may materially impair their strength.

(3) Piles must be butt cut above the ground swell and have a uniform taper from butt to tip. Short bends will not be allowed. A line drawn from the center of the butt to the center of the tip shall lie within the body of the pile.

(4) Unless otherwise specified, piles shall be peeled.

(5) The minimum diameter at the tips of piles shall be 9 inches for lengths not exceeding 40 feet and 8 inches for lengths over 40 feet.

6. The diameter at the butt shall not be less than 14 inches and shall not exceed 22 inches. [108]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATION FOR CEDAR PILES.

(1) Piles shall be of Western Red Cedar unless otherwise specified by the Railroad Company.

(2) Piles shall be cut from live, sound trees, free from defects, such as injurious ring shakes, large and unsound or loose knots, decay or other defects, which may materially impair their strength or durability.

(3) Piles must be butt cut above the ground swell and have a uniform taper from butt to tip. Short bends will not be allowed. A line drawn from the center of the butt to the center of the tip shall lie within the body of the pile.

(4) Unless otherwise allowed, piles shall be cut when sap is down. Piles shall be peeled soon after cutting. All knots shall be trimmed close to the body of the pile. The ends shall be sawed square and finished in a workmanlike manner.

(5) Piles 40 feet or less in length shall be not less than 10 inches in diameter at narrowest part of top.

(6) Piles over 40 feet in length shall be not less than 9 inches in diameter at narrowest part of top.

(7) All piles shall be not less than 14 inches in diameter at the butt and not over 22 inches in diameter at widest part. [109]

SPECIFICATION No. E-109
FOR THE CONSTRUCTION OF BRIDGE MASONRY AND RETAINING WALLS.
Printed Form dated 6-6-22.
No. copy available. [110]

PART 4
SPECIFICATIONS FOR
TRACKLAYING AND SURFACING.
CONTENTS.

Section	Subject	Paragraph
1	Tracklaying	1-18
2	Earth Surfacing	19-23
3	Ballasting	24-36

[111]

SPECIFICATIONS
FOR
TRACKLAYING, SURFACING AND BALLASTING.

(1) Tracklaying.

Description of Work.

1. Tracklaying shall include all the work of laying the main track, sidings, or other permanent tracks, frogs, switches, rail braces, tie plates, crossings, etc., laying and spiking the plank of road crossings wherever required, and trimming down or filling up the surface of the roadbed to bring it to a true grade. Also setting all track markers and signs.

Unloading and Handling Material.

2. The Contractor shall unload all material furnished by the Company or by the Contractor. Material shall be properly stored at least six (6) feet from the nearest rail and any material furnished by the Company, lost or damaged in handling by the Contractor during the progress of the work, shall be replaced by the Contractor at his expense, unless such loss or damage is plainly the fault of the Company. Material furnished by the Company which is received before the Contractor is on the ground will, if necessary to release cars, be unloaded by the Company in the nearest available material yard, and material unloaded by the Company shall be handled from the point where it is unloaded to the site of the work by the Contractor, without additional cost to the Company. All material held on cars or received after the Contractor is on the ground, shall be unloaded promptly by the Contractor at his expense. [112]

Train Service.

3. The Company will furnish, without cost to the Contractor, such engine and work train service as shall, in the judgment of the Engineer, be required for hauling ballast, including spotting engine at the pit. All other work train service for track work, rail laying, etc., shall be furnished at the expense of the Contractor.

Ballast Equipment.

4. The Company will furnish, without cost to the Contractor, rolling equipment, such as ballast cars, balast spreader and Lidgerwoods as in the judgment

of the Engineer shall be necessary. The Contractor shall make field repairs at his expense and at the completion of the work, he shall return such cars to the Company in as good condition as when he received them.

Rental Or Equipment.

5. On the request of the Contractor the Company will furnish equipment to the Contractor, such as flat cars, box cars, bunk cars, etc. The Contractor shall repair all damage to such equipment furnished for his use and return it in as good condition as when he received it. Rental rates for such equipment shall be as follows:

Water Cars	$1.00 per day
Caboose (8 wheel)	1.70 per day
Refrigerator Cars	1.30 per day
Box Cars	1.30 per day
Flat Cars	1.00 per day
Office, Bunk, Supply and Tool Cars	0.75 per day

6. Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other Contractors. The specified contract price [113] per car mile to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company.

7. In addition to Contractor's own material and that covered by his contract, Contractor shall handle as required, material from operated line set out track to material yard tracks for unloading. The specified contract price per car to include all necessary switching and spotting.

Lining and Spacing.

8. Center stakes for tracklaying shall be set by the Engineer two hundred (200) feet apart on tangents, and one hundred (100) feet or less apart on curves. Cross ties shall be laid to a line with the north or east end four (4) feet from the center of the track. Selected ties shall be used for joints spaced to fit the angle bars. Generally eighteen (18) ties will be used to a thirty-three foot rail, but this may be modified at the discretion of the Engineer. Whenever the surface of a tie is in wind, it must be adzed so as to give both rails a full bearing across the face of the tie. Unnecessary adzing of creosoted ties is prohibited.

Broken Joints.

9. Track shall be laid with broken joints; the joints on one side not to be allowed to run more than twelve inches one way or the other from the center of the rail on the opposite side. Rail joints should not be located nearer than five feet from end of bridges. Rail should not be cut to accomplish this, but short lengths used. **[114]**

Expansion Shims.

10. Proper opening must be allowed for expansion and contraction, iron shims being used and left

in the joints until all danger of driving the rail is over.

11. Expansion to be allowed for according to temperature:—

Over 100 degrees rails shall be laid close without bumping.
1/16″ for +75 degrees to +100 degrees.
1/8″ for +50 degrees to + 75 degrees.
3/16″ for +25 degrees to + 50 degrees.
1/4″ for 0 degrees to + 25 degrees.
5/16″ for —20 degrees to zero.

Gauging Track Curving Rail—Use of Short Rails.

12. The rails shall be laid accurately to standard gauge 4′-8½″ on tangents, and on curves up to and including eight degrees; for curves sharper than eight degrees, the gauge to be widened at the rate of 1/16″ for each degree of curve above eight degrees. On curves three degrees and over, the rails shall be correctly curved by the Contractor so as to fit true to line. Short rails shall be used for the inside of curves, as required, to keep the joints within twelve inches of the center of the opposite rail.

Tie Plates.

13. Tie plates shall be furnished by the Company as may be considered necessary by the Engineer, and shall be placed by the Contractor. They shall be placed as the tracklaying progresses in correct position on the tie, true to gauge, square with the rail, and after they have been brought to a full

and firm bearing on the tie, the spikes must be gone over again and driven home.

Rail Anchors.

14. Rail anchors will be furnished by the Company and shall be applied by the Contractor at the points and in the quantities specified by the Engineer. Anchors shall be set [115] firmly against the ties in the direction of creeping and care shall be used to avoid over driving or otherwise damaging the anchors in their application.

Angle Bars.

15. The angle bars shall be firmly secured in place by the full number of bolts with nuts turned up tight; bolts to be staggered, heads placed inside and outside alternately. After the track has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight.

Spiking.

16. Rails shall be fully spiked throughout as laid; spikes to be set vertically and driven home. The two inside spikes shall be driven near, but not less than two (2) inches from the west edge of the tie and the two (2) outside spikes shall be driven near, but not less than two (2) inches from the east edge of tie. The angle bars shall be spiked in the slots. Tracks shall be gauged as spikes are driven at joints, centers and quarters, and no excuse shall be taken for incorrect gauging. On bridges the track shall be accurately lined up before being spiked and spikes shall be driven in every other bridge tie only. No slot spiking will be permitted on bridges.

Switches.

17. Switches shall be put in according to stakes set by the Engineer and according to plans furnished.

Crossings.

18. Road crossing planks shall be put in at the time track is laid, necessary plank and boat spikes for same being furnished by the Company. Track spikes shall not be used in fastening down crossing planks. No extra price shall be [116] paid for putting in road crossing plank, the expense of same being included in the price paid per mile for tracklaying.

Payments.

19. Tracklaying shall be estimated and paid for by the track mile. Side tracks shall be estimated from headblock to headblock of switch, and paid for at the same price as main track. Only such sidings, spurs and material yard tracks as are shown on plans or covered by written orders of the Engineer shall be paid for. Side tracks or spurs put in by the Contractor on his own initiative shall not be paid for, and shall be removed by the Contractor on the completion of the work without expense to the Company.

Contractor's Liability.

20. Contractor shall be held responsible for all material furnished for the work, and all surplus and scattered material must be picked up as the work progresses and loaded on cars.

Miscellaneous Work.

21. All crossing, flanger, station, tank and other signs, mile posts and extra rail rests, and clearance posts, are to be set by the Contractor as directed by the Engineer, and shall be considered a part of the tracklaying and surfacing; and the expense of setting will be held to be included in the price paid for tracklaying.

(2) Earth Surfacing.

Running Surface.

22. Running surface consists of putting track in condition to preserve the rail, fastenings and expansion from injury by the passing of construction or other trains until such time as ballasting is done. Such surfacing of track shall be done by casting material from the sides of cuts or [117] embankments, or by using push cars, as directed by the Engineer. Work of this kind shall be done without injury to the roadbed. Running surface shall be made and maintained by the Contractor without expense to the Company.

Full Surface.

23. Full earth surfacing, as may be directed by the Engineer, shall consist of full tamping, filling between all ties and filling and rounding center of track with material from sides of track or elsewhere as may be provided.

Finished Grade—Dressing Slopes.

24. Stakes will be set for the finished grade by the Engineer, the tops of the stakes to be the top

of the rail after surfacing is completed, and the work of surfacing shall be done in strict accordance with such stakes. The track shall be raised to final grade as indicated by the surfacing stakes set by the Engineer, and all ties shall be well bedded and tamped. Particular attention shall be paid to this matter and no track shall be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to Standard Plan T-16-101 furnished by the Engineer, and all slopes neatly dressed.

Ditches.

25. All ditches shall be left clear and free, opened and extended so as to allow water at all times to flow freely away from the roadbed, and special care must be taken that side ditches in cuts are left unobstructed.

Elevation Outer Rail.

26. On curves, the outer rail shall be elevated as directed by the Engineer, the elevation to be carried out on tangents at both ends, where necessary, as directed by the Engineer. On all other portions of tangents, both rails shall [118] be brought to the same level. The track shall all be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer.

(3) Ballasting.

Description.

27. Ballasting shall consist of full tamping, filling between all ties, and levelling and sloping with material taken from pits provided by the Company.

Side Surfacing.

28. When material of which roadbed is made is suitable for ballast, the track shall be surfaced from the sides, otherwise the material shall be hauled by the Contractor as specified in Paragraph 3 of this section, in which case it will be classified as ballast. Material for filling or ballasting shall not be taken from the slopes of embankments.

Handling and Hauling.

29. The Contractor shall load, haul, unload and spread the ballast; and place same under the track and finish to standard section. Amount of lift to be as directed by the Engineer.

Pit Operations.

30. The expense of cutting steam shovel into ballast pit, shifting steam shovel from one pit to another pit and for all shifting of track in ballast pit, shall be borne by the Contractor, the Company to pay for the first laying of track in ballast pits.

Finished Section.

31. Ballast contour and ditches must conform to the standard plans of the Company.

Ditches.

32. All road and surface ditches shall be left clear and free, so as to conduct water freely and quickly from the roadbed; and all side ditches must be left unobstructed. [119] The side slopes and ditches shall be left neat and smooth, and free from all rubbish, material and obstructions.

Running Surface Damaged Rails.

33. All new track must be brought to surface and tamped up before it is run over. Rails that are damaged by reason of neglect on the part of the Contractor to comply with these requirements will be replaced at his expense.

Completion Maintenance Acceptance.

34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so mainained by the Contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until it is fully completed.

Ballast Grade.

35. Stakes shall be set for the ballasting by the Engineer, the top of the stakes to be the top of the rail after ballasting is completed, and the work of ballasting shall be done in strict accordance with said stakes.

Measurement Limits of Haul.

36. Ballast shall be measured in excavation; the Engineer will designate the limits to which the ballast from each pit shall be hauled.

Distribution, Surplus Material and Waste.

37. The Contractor shall be responsible for the proper distribution of ballast material, sufficient to lift the track according to stakes, and dress same according to standard plan, and all surplus ballast material in one place shall be picked up and used to fill out a deficiency in other places. Care shall be

taken by the Contractor that ballast is not wasted on the sides of the roadbed, and in the event that any is so wasted, it will not be paid for by the Company. [120]

Tamping Finishing and Dressing.

38. All ties shall be well bedded and tamped, the centers loosely tamped. Particular attention must be paid to this matter and no track will be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to standard plan, and all slopes neatly dressed.

Elevation Outer Rail.

39. On curves, the outer rail shall be elevated as directed by the Engineer, the elevation to be carried out on tangents at both ends, where necessary, as directed by the Engineer. On all other portions of tangents, both rails must be brought to the same level. The track shall be well lined and have a smooth and even surface, and shall be kept in that condition until accepted by the Engineer. [121]

NORTHERN PACIFIC RAILWAY COMPANY PROPOSAL

For Clearing, Grubbing, Grading, Culverts, Bridging, Tracklaying and Ballasting on the proposed branch line extending from Oro Fino to Headquarters.

Location, Oro Fino, Clearwater County Idaho
Division Idaho.

The undersigned hereby propose, and, if this proposal is accepted, agree to enter into a written con-

tract, if required, with the Northern Pacific Railway Company, to do all the work for which prices are named herein, according to the plans and directions of the Engineer for said Company, in conformity with the specifications made for said work and attached hereto, upon the terms and conditions of the contract to be prepared therefor, and within the time specified.

The following prices include all labor, material and equipment of every description necessary for the construction of the work, with the exception of material entering into the permanent construction, which will be furnished by the Railway Company, except as otherwise noted.

(1)	Heavy Clearing, per acre	$165.00
(2)	Clearing sage brush, greasewood and other brush, per acre	$ 45.00
(3)	Cutting isolated and dangerous trees, each	$ 3.00
(4)	Grubbing, per acre	$180.00
(5)	Common Excavation, per Cu. Yd.	$ 0.38
(6)	Hard Pan, per Cu. Yd.	$ 0.55
(7)	Loose Rock, per Cu. Yd.	$ 0.65

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(8)	Solid Rock, per Cu. Yd.	$ 0.99
(9)	Solid Rock Borrow, per Cu. Yd.	$ 0.99
(10)	Overhaul, per Cu. Yd. per each 100-ft. beyond 500 ft. free haul.	$ 0.02
(11)	Corduroy, in place, per Cu. Yd.	$ 3.00
(12)	Loose Riprap, in place, from borrow, per Cu. Yd.	$ 1.85

(13) Loose Riprap, in place, from Excavation, per Cu. Yd. $ 0.80

(14) Hand Placed Riprap, in place, including the paving of culverts, from borrow, per Cu. Yd. $ 3.50

(15) Hand Placed riprap, in place, including the paving of culverts, from excavation, per Cu. Yd. $ 2.50

(16) Dry Wall protection work, in place at culvert ends, etc., from borrow, per Cu. Yd. $ 7.00

(17) Dry Wall protection work, in place at culvert ends, etc., from excavation, per Cu. Yd. $ 6.00

(18) Blind Drains, in place, including brush top, per Cu. Yd. $ 3.50

(19) Driving Piles in protection work, per lineal foot above cut-off $ 0.18
(Ry. Co. to furnish piles)

(20) Driving piles in protection work, per lineal foot below cut-off $ 0.32
(Ry. Co. to furnish piles)

(21) Driving piles in protection work, per lineal foot above cut-off $ 0.32
(Contractor to furnish cedar piles at the site of structure).

(22) Driving piles in protection work, per lineal foot below cut-off $ 0.44
(Contractor to furnish cedar piles at the site of structure)

(23) Furnishing, hauling and placing local round cedar logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed $ 0.32
(Railway Company to furnish metal fastenings) [123]

(24) Furnishing, hauling and placing local round pine logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed $ 0.30
(Railway Company to furnish metal fastenings)

(25) Furnishing and placing rock in revetments and dykes, etc., per cubic yard in place $ 2.50

(26) Furnishing, hauling and placing brush, per cord in place $ 16.00

(27) Placing sawed timber in culverts, including metal fastenings, per thousand F.B.M. in place $ 13.50
(Railway Company to furnish timber and metal fastenings)

(28) Furnishing, hauling and placing sawed local timber in culverts, and placing metal fastenings, per thousand F.B.M. in place $ 38.00
(Railway Company to furnish metal fastenings)

(29) Furnishing, hauling and placing logs in culverts, and placing metal fastenings, per lineal foot of logs in place $ 0.28
(Railway Company to furnish metal fastenings)

(30) Placing 24″ concrete culvert pipe, per lineal foot of culvert in place $ 1.10
(Railway Company to furnish pipe)

(31) Placing 36″ concrete culvert pipe, per lineal foot of culvert in place $ 1.80
(Railway Company to furnish pipe)

(32) Placing 18″ corrugated iron culvert pipe, per lineal foot of culvert in place $ 0.60
(Railway Company to furnish pipe)

(33) Placing 24″ corrugated iron culvert pipe, per lineal foot of culvert in place $ 0.80
(Railway Company to furnish pipe)

(34) Placing 36″ corrugated iron culvert pipe, per lineal foot of culvert in place $ 1.10
(Railway Company to furnish pipe)

(35) Team Haul for concrete pipe, per ton per mile $ 0.65

(36) Team Haul for corrugated iron pipe, per ton per mile $ 0.85

[124]

(37) Hauling piles furnished by the Company, per lineal foot per mile $ 0.02

(38) Hauling Timber furnished by the Company, per thousand F.B.M. per mile $ 0.85

(39) Hauling metal fastenings, per ton per mile $ 0.65

(40) Hauling galvanized iron, per ton per mile $ 0.65

(41) Hauling cement, per sack per mile $ 0.04

(42) Driving piles in trestles bents, per lineal foot above cut-off $ 0.18
(Railway Company to furnish piles)

(43) Driving piles in trestle bents, per lineal foot below cut-off $ 0.32
(Railway Company to furnish piles)

(44) Driving piles in trestle bents, per lineal foot above cut-off $ 0.32
(Contractor to furnish cedar piles at the site of structure)

(45) Driving piles in trestle bents, per lineal foot below cut-off $ 0.44
(Contractor to furnish cedar piles at the site of structure)

(46) Driving piles in trestle bents, per lineal foot above cut-off $ 0.32
(Contractor to furnish piles for temporary work at site of structure)

(47) Driving piles in trestle bents, per lineal foot below cut-off $ 0.44
(Contractor to furnish piles for temporary work at site of structure)

(48) Placing sawed timber in pile or frame trestles, including metal fastenings, per thousand F.B.M. in place $ 16.50
(Railway Company to furnish timber and metal fastenings)

(49) Furnishing, hauling and placing sawed local timber in pile or frame trestles, and placing metal fastenings, per thousand F.B.M. in place $ 43.00
(Railway Company to furnish metal fastenings) [125]

(50) Furnishing, hauling and placing round local timber in frame trestles, and placing metal fastenings, per thousand F.B.M. in place $ 0.50
(Railway Company to furnish metal fastenings)

(51) Furnishing, hauling and placing local round cedar timber in frame trestles, and placing metal fastenings, per thousand F.B.M. in place $ 0.53
(Railway Company to furnish metal fastenings)

(52) Placing galvanized iron fire protection on bridges, per pound in place $ 0.025
(Railway Company to furnish galvanized iron)

(53) Furnishing, hauling and placing local round cedar logs in pier cribs, and placing metal fastenings, per lineal foot of logs placed $ 0.32
(Railway Company to furnish metal fastenings)

(54) Furnishing, hauling and placing local round pine logs in pier cribs, and plac-

ing metal fastenings, per lineal foot of logs placed $ 0.30
(Railway Company to furnish metal fastenings)

(55) Furnishing and placing rock in pier cribs, per cubic yard of rock in place $ 2.50

(56) Dry foundation excavation, common material, per cubic yard $ 0.60

(57) Dry foundation excavation, loose rock, per cubic yard $ 1.20

(58) Dry foundation excavation, solid rock, per cubic yard $ 2.00

(59) Wet foundation excavation, common material, per cubic yard $ 2.50

(60) Wet foundation excavation, loose rock, per cubic yard $ 3.50

(61) Wet foundation excavation, solid rock, per cubic yard $ 5.00

(62) Furnishing materials and placing concrete 1-3-5 mixture in pedestals for support of frame bents, per cubic yard $ 22.50

(63) Furnishing materials and placing concrete 1-3-5 mixture in bridge piers, per cubic yard $ 20.00

(63a) Hauling concrete aggregate per ton per mile $ 0.60

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(64) Furnishing materials and placing rubble masonry in pedestals and piers, per cubic yard $ 17.50

(65) Tracklaying, including running surface, unloading and reloading material at material yard, transporting it to the front, curving rails, placing road crossing planks, track markers and signs and reloading all surplus track material, per mile of track $1400.00
(Railway Company to furnish all material)

(66) Switches complete in place, each $120.00
(Railway Company to furnish material)

(67) Placing tie plates, per mile of track $250.00
(Railway Company to furnish material)

(68) Application of rail anchors, per anchor in place $ 0.03
(Railway Company to furnish material)

(69) Full earth surface, per mile of track $1200.00

(70) Loading, unloading and placing ballast under track and finishing to section when total lift is 6″ or less, per cubic yard $ 0.80

(71) Loading, unloading and placing ballast under track and finishing to section when total lift is over 8″, per cubic yard, said unit price to apply to the entire amount of ballast placed $ 0.80

(72) Handling prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile $ 1.00

(73) Handling cars of material in addition to Contractor's own material and that covered by his contract, as required, from operated line set out track to material yard tracks for unloading, including all necessary switching and spotting, per car $ 10.00

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Oro Fino Branch Construction
Supplementary Proposal Covering Tunnels.

(74) Tunnel excavation for a net section of 377 square feet, including 500 foot free haul of excavated material, per lineal foot of tunnel $ 95.00

(75) Tunnel excavation outside of 377 square feet net section, including 500 foot free haul of excavated materials, per cubic yard 4.50

(76) Placing sawed timber in permanent tunnel linings, including metal fasten-

	ings, per thousand F. B. M. in place (Railway company to furnish timber and metal fastenings)	22.50
(77)	Furnishing, hauling and placing sawed local timber and metal fastenings in permanent tunnel linings, per thousand F. B. M. in place	48.00
(78)	Furnishing, hauling and placing hewed local timber and metal fastenings in permanent tunnel linings, per thousand F. B. M. in place	56.00

[128]

Transportation.

The Railway Company will furnish free transportation over the line of the Northern Pacific Railway Company, subject to the review and instructions of the Chief Engineer as to the necessity for and proper use of same, as follows:—

Passenger Transportation: (To be used only when traveling on business in connection with this contract.)

1. For one member and one superintendent of the Contractor's firm or corporation, passes good on Northern Pacific System.

2. For subcontractors from any point on Northern Pacific System to the Northern Pacific Railway station nearest the site of the work and return.

3. For foremen and laborers from any point on Northern Pacific System to the Northern Pacific Railway station nearest the site of the work.

4. Return transportation will be furnished to such foreman and skilled labor as may remain until completion of the class of work on which employed, but no free return transportation will be granted for common laborers.

Freight Transportation.

1. For all material to be used in the work (except as hereinafter provided) from any point on Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work.

2. For tools, outfit and equipment used in the work from any point on Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work and return to point from which same were originally shipped to the work, or to any [129] intermediate point on the line of the Railway Company. The right to such free transportation must be exercised within ninety days after the date of completion of the work, after which time no free return transportation will be furnished.

3. The Contractor shall pay full tariff rates on all coal, boarding and commissary supplies, hay and grain, lumber for camps, powder and explosives, and shall buy all materials, if possible, at points which will permit the Company to receive the haul on same, routing same via the lines of the Company and its connecting lines.

Transportation—General.

Exceptions may be made in the above stipulations covering passenger and freight transporta-

tion, and additional or other transportation may be furnished, as in the discretion of the Chief Engineer may be found necessary for the proper handling of the work.

Free Transportation will be required from the following points: Equipment from St. Paul, Spokane-Seattle No. of Carloads 50 Men from Portland, St. Paul, Spokane, Seattle No. of men 2500.

The work is to be commenced immediately after the award of contract and completed as follows:

The Grading, Bridging and Tracklaying are to be completed on or before June 1st, 1927.

All work is to be completed on or before September 1st, 1927.

The Railway Company reserves the right to reject any and all bids, and, at its option, to require a satisfactory bond from the Contractor for the faithful performance of the work. **[130]**

All proposals to be sealed, marked "Proposal for the Construction of the Oro Fino Branch," and addressed to the Chief Engineer of the Northern Pacific Railway Company, Saint Paul, Minnesota.

Bids will be received until October 12th, 1926.

Signature of Proposer
TWOHY BROTHERS COMPANY
By JAMES TWOHY.

Address
Old National Bank Bldg., Spokane, Wash.

Date October 12, 1925. **[131]**

EXHIBIT "B"

Supplemental agreement made this 26th day of April, 1927, between Northern Pacific Railway Company, hereinafter called the "Company," and Twohy Brothers Company, of Spokane, Washington, hereinafter called the "Contractor":

The parties hereto are parties to an agreement dated the 15th day of October, 1925, under the terms of which the Contractor has agreed to build a branch line of railroad for the Company extending from Oro Fino to Headquarters in the State of Idaho. The Contractor has said branch line partially completed but is now in default under said contract and is indebted to material and supply men and others for such large amounts that it is impossible for the Contractor to continue work under said contract, and the Company now has the right to cancel said contract but is willing to make the arrangement herein set forth to enable the Contractor to continue work under said contract.

In consideration of the premises the parties agree as follows:

The Company, acting through and by the Contractor, will pay Contractor's outstanding bills covering items of material and supplies (including camp supplies), which have gone into the work and shall reimburse itself to the extent of forty-nine thousand nine hundred forty-five dollars and twenty-five cents ($49,945.25) from the retained percentages now held by the Company under said contract as security for complete performance of said contract, and shall have the right to reimburse itself for the balance of the amount so expended

by the Company in payment of Contractor's outstanding bills from future monthly estimates as they fall due. The balance of said estimate shall be paid [133] to and applied by the Contractor in payment of current bills as they fall due for labor, material and supplies (including camp supplies) going into the work.

The Company will conduct an audit of outstanding bills and of the Contractor's books, which books will be open to such audit at any and all times on request of the Company and the Company will place an auditor in the Oro Fino office of the Contractor for that purpose. All bills hereafter incurred and payments made in the prosecution of the contract will be audited by the Company, such audit to be made currently as bills are contracted and paid.

This agreement is supplemental to and amendatory of said agreement of October 15, 1925. As evidence of its consent to and concurrence in the arrangement herein set forth and its agreement that payments to the Contractor or for Contractor's account shall be handled as hereinabove provided, Old National Bank of Spokane, Washington, assignee of payments under said contract of October 15, 1925, by virtue of an assignment dated October 18, 1925, has caused this agreement to be signed on its behalf by its President duly thereunto authorized.

Nothing in this contract contained shall be construed to be an assumption by the Company of obligations of the Contractor now existing or hereafter incurred to subcontractors, material or supply men or anyone else in connection with said con-

tract of October 15, 1925, as hereby supplemented and amended, or as abrogating any right or rights of the Company under said contract.

If the Contractor at any time shall fail to perform any agreement herein contained the Company may cancel this contract [134] and said contract of October 15, 1925; in which event the Contractor shall have no claim for damages, or for compensation for work done or material furnished, or for any portion of the percentage retained on monthly estimates; and the Company shall have the right to take possession of and hold the work done and material furnished and to retain all moneys which may be then unpaid.

In witness whereof the parties hereto have caused this agreement to be executed by their duly authorized officers the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,
By (Sgd) H. E. STEVENS.
TWOHY BROTHERS COMPANY,
By (Sgd) JAMES TWOHY,
Secy.
OLD NATIONAL BANK OF SPOKANE, WASHINGTON,
By (Sgd) W. D. VINCENT,
President.
(Sgd) THE OLD NATIONAL BANK AND UNION TRUST CO.,
Successor.
W. D. VINCENT,
Pres.

[Endorsed]: Answer and Exhibits thereto Filed March 30, 1929. G. H. Marsh, Clerk. [135]

And afterwards, to wit, on the 24th day of August, 1929, there was duly filed in said Court, a reply, in words and figures as follows, to wit: [138]

[Title of Court and Cause.]

REPLY.

Comes now plaintiff, and for reply to the further and separate answer herein and so-called cross complaint, and the affirmative allegations incorporated in said answer in conjunction with the denials, admits, denies and alleges as follows:

I.

Denies each and every allegation contained in Paragraph VI beginning on Page 2, Paragraph VII beginning on Page 3, Paragraph VIII beginning on Page 4, Paragraph IX beginning on Page 5, Pararaph XIII beginning on Page 6, Paragraph XIV beginning on Page 6, Paragraph XV on Page 7, Paragraph XVIII on Page 8, Paragraph XIX beginning on Page 8, Paragraph XX on Page 9, Paragraph XXI on Page 9, Paragraph XXIII beginning on Page 10, Paragraph XXV beginning on Page 11, Paragraph XXVI beginning on page 12, Pararaph XXVII beginning on Page 13, and Paragraph XXIX on Page 14 of said answer.

II

Admits all of the allegations of Paragraph I of said further and separate answer. [139]

III

Admits all of the allegations of Paragraph II.

IV

Replying to Paragraph III of said further and separate answer, plaintiff denies that said contract gave to defendant any of the rights therein alleged, and denies that said contract contained the provisions recited in said paragraph and refers the Court to the contract for the exact wording thereof.

V

Denies each and every allegation contained in Paragraph IV of said further and separate answer, except that plaintiff admits that the construction of said railroad contemplated and required adequate financing and effective organization on the part of plaintiff, and that it involved a large amount of excavation and extensive bridge work and other work ordinarily included in railroad construction in a mountainous region.

Plaintiff further alleges that it was adequately financed and had an effective organization to perform not only the work contemplated by the parties at the time the contract was made, but also the very greatly increased amount and changed character of work required of plaintiff by defendant as alleged in the complaint, but that defendant's engineers from the outset of the performance by plaintiff of the work under said contract consistently and persistently refused to allow plaintiff in the monthly estimates the full amount of work performed by the plaintiff at the time such estimates were made and intentionally and knowingly allowed plaintiff in

each monthly estimate quantities far below the true amount of work which had at said time been performed by plaintiff, and knowingly and intentionally refused to classify [140] materials excavated by plaintiff according to the nature of such materials, but instead placed the same in cheaper classifications than those to which plaintiff was entitled; that during the year 1926 plaintiff in its grading operations encountered approximately 200,000 cubic yards of a spongy, sticky conglomerate of boulders, clay and mica, which could only be handled at an expense greatly in excess of the cost of handling solid rock for which classification the highest price was named in said contract, the cost of handling said material being approximately $1.38 per cubic yard; that neither plaintiff nor defendant knew at the time the contract was made that any such material would be encountered nor did they or any of them have any means of knowing or suspecting the same; that plaintiff demanded of defendant that said material be classified specially in accordance with the terms of Articles 58 and 59 of the grading specifications; that defendant conceded that such material should be classified specially but refused to fix the price therefor with due regard to the prices fixed for other classifications, but compelled plaintiff to accept as pay therefor $1.20 per cubic yard. That thereafter much more of said material was excavated and payment for a part of said material was made at said price of $1.20 per cubic yard, and that the alleged over pay-

ments on excavation referred to in said paragraph IV of the separate and further answer consisted of the payments made for said specially classified material at the rate of $1.20 per cubic yard which was far below the actual cost to plaintiff of handling the same; that neither at the time said price was fixed or at any time up to the time the complaint was filed herein did defendant assert or pretend said price was too high or incorrect or a gratuity or advancement above the amount to which plaintiff was then entitled. [141]

Plaintiff further alleges that from time to time as contemplated by its contract with defendant it made claims for extra work and various items of work performed as to which it disagreed with the resident engineer as to which of the prices provided for in the contract applied. Said claims were denied by defendant's resident engineer and were thereupon submitted to the Chief Engineer of defendant. A part of said claims were from time to time allowed by the Chief Engineer of the defendant and the rest refused; that the alleged over payments which defendant claims to have made on the bridge work and on track and ballast work consist of some part of the claims asserted by plaintiff under the contract as the work was in progress and allowed by the Chief Engineer of the defendant; that without the bill of particulars demanded by plaintiff it is impossible for plaintiff to know and it does not know to what particular claims defendant refers; that at no time after the allowance of said

claims and up to and until after the filing of the complaint in this action has the defendant asserted or claimed that said payments were incorrect or should not have been made or were gratuities or advancements beyond the amounts at said time earned by plaintiff.

VI

Denies each and every allegation in Paragraph V of said further and separate answer, except it admits that on or about April 26, 1927 the so-called supplemental contract attached to the answer and marked Exhibit B was executed by the parties and alleges the fact to be that at said time defendant's engineer by said consistent and persistent short estimating of the amount of work performed each month by plaintiff and improper classifications was withholding from [142] payments to which plaintiff was entitled under the terms of the contract for work done more than $200,000.00 over and beyond the 10% retained percentage provided for in the contract, thereby seriously hampering plaintiff financially and at the same time insisting upon great speed in the work; that plaintiff frequently protested to the resident engineer of the defendant against such short estimates and improper classifications without any result until finally in April, 1927 the inaccuracy and insufficiency of such estimates became so glaring and so burdensome that plaintiff demanded of the Chief Engineer of defendant that estimates reasonably approximating the amounts to

which plaintiff was then entitled be given forthwith to plaintiff on the penalty of abandoning the contract; that defendant's Chief Engineer refused to pass upon the justice of plaintiff's claims but insisted upon postponing the same until completion of all of the work which would have forced plaintiff to discontinue the work; that defendant's Chief Engineer thereupon asserted and pretended that plaintiff was in default, although he well knew that plaintiff was not in default, and offered to advance to plaintiff a part of the amount which plaintiff was then entitled under the contract if plaintiff would execute said instrument attached to the answer as Exhibit B, the so-called supplemental contract, and that plaintiff, in order to secure a part of the money to which under the contract it was then entitled and to be able to continue the work, and not otherwise, and with full knowledge on the part of defendant that plaintiff was not in default, was compelled to and did execute said Exhibit B.

VII.

Denies each and every allegation contained in Paragraphs VI and VII of said further and separate answer, except that [143] plaintiff admits that from time to time after April 26, 1927 defendant advanced to plaintiff various sums of money, but at no time were such advances equal to the amounts then earned by plaintiff, and at no times were said advances even equal to the amounts shown by defendant's short estimates and improper classifications to be due plaintiff.

IX.

Denies each and every allegation of Paragraph VIII of said further and separate answer, except that plaintiff admits that on or about July 16, 1927 defendant took possession of the first 29 miles of said railroad and excluded plaintiff therefrom and plaintiff alleges that such possession was taken forcibly by the defendant over the protest of the plaintiff and was so taken for the purpose of defrauding the plaintiff out of the revenue which plaintiff would have earned for hauling commercial freight which was at that time being shipped; that such possession was not taken by defendant in good faith but solely and only for the purpose of perpetrating said fraud on plaintiff.

X.

Denies each and every allegation of Paragraph IX of said further and separate answer, except that it admits that it objected to defendant's taking possession of said 29 miles of railroad.

XI.

Denies each and every allegation contained in Paragraph X, except that it admits that plaintiff demanded payment for hauling materials as stated in said paragraph.

XII.

Denies each and every allegation contained in Paragraph XI of said further and separate answer.

[144]

Further replying to the affirmative matter contained in the answer herein and as an affirmative reply thereto, and particularly Paragraphs VII, IX and X thereof, the plaintiff alleges as follows:

I.

That it has no knowledge or information of any such arbitration proceedings as those referred to therein having ever been held, and plaintiff has no knowledge or information of any of such alleged decisions having been made; that the defendant did not at any time during the progress of the work under said contract and has not since that time made any demand that the Chief Engineer arbitrate any of the matters or things referred to in Paragraphs VII, IX and X of said affirmative answer; that neither defendant nor said Chief Engineer ever gave any notice to plaintiff that any of said matters were being or were about to be arbitrated; that plaintiff was never invited or given any opportunity by defendant or said Chief Engineer to be heard at any arbitration hearing in reference to any of said matters, nor was plaintiff present or heard at any of said alleged arbitration proceedings; that if said Chief Engineer ever undertook to arbitrate said matters or any of them, or to make any of said decisions he is alleged in said answer to have made, said arbitrations were held without notice to plaintiff, without knowledge on the part of the plaintiff thereof, without any opportunity for plaintiff to be heard, and without any participation by plaintiff in any such arbitration proceedings, or any of them.

II.

Plaintiff further alleges that if said Chief Engineer did, without notice to plaintiff, attempt to arbitrate the matters referred to in Paragraphs VII, IX and X [145] of said affirmative answer, and did attempt to make any of the decisions he is alleged in said paragraphs to have made, that said Chief Engineer did not exercise his honest and independent judgment thereon but consulted with the President and attorneys of the defendant and the officers of the Union Pacific System and of Weyerhauser Timber Company, which companies are and were under contract with defendant by which they agreed to bear a part of the cost of said railroad and followed their directions and advice; that said Chief Engineer did not act impartially but was partial to defendant and acted at all times in defendant's interest.

III.

That the contract between plaintiff and defendant gave no right to defendant to take away from plaintiff any important part of the work and itself perform that part of the work; that any alleged decision of the Chief Engineer that such right was given to defendant by said contract, if ever made, was not the result of the honest and independent judgment of said Chief Engineer as to the meaning of said contract, but was made for the sole and fraudulent purpose of taking away from plaintiff a valuable part of its contract and to save expense to defendant and its partners in the construction of said railroad.

IV.

That the contract between plaintiff and defendant named plainly the prices to be paid plaintiff for hauling timbers, piles and metal fastenings; that any alleged decision of said Chief Engineer requiring plaintiff to accept lower prices for such hauling than those named in the contract, if ever made, was not the result of the honest and independent judgment of said Chief Engineer as to the meaning of said [146] contract, but was made for the sole and fraudulent purpose of depriving plaintiff of a part of the remuneration called for by said contract and to save expense to defendant and its said partners, and was made at the instance of defendant's other officers and at the instance of officers of said partners in said construction, and was made in bad faith and is grossly wrong and unjust.

Wherefore, having fully replied to the affirmative matter in said answer plaintiff demands judgment as prayed for in the complaint.

GARRECHT & TWOHY
WILSON, REILLY & ISAACS
Attorneys for Plaintiff

United States of America
District of Oregon
State of Oregon
County of Mutlnomah—ss.

John F. Reilly, being first duly sworn, deposes and says: that he has read the foregoing reply, knows the contents thereof, and that the same is true; that he makes this verification for the reason

that there are not now in the state of Oregon any officers or agents of Twohy Brothers Company authorized by law to make verifications in its behalf.

JOHN F. REILLY

Subscribed and sworn to before me this 24th day of August, 1929.

[Seal] ROSE W. SHENKER
Notary Public for Oregon

My commission expires: Jan 8, 1932.

[Endorsed]: Filed August 24, 1929. [147]

And afterwards, to wit, on the 29th day of April, 1936, there was duly filed in said Court, a stipulation to try cause without the intervention of a jury, in words and figures as follows, to wit: [148]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the plaintiff and defendant that the above entitled cause may be tried and determined by the court, without the intervention of a jury, the parties hereby agreeing to waive a jury.

Dated April 29, 1936.

DELANCEY C. SMITH
McCAMANT, THOMPSON & KING
Attorneys for Plaintiff.
L. B. daPONTE
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1936. [149]

And afterwards, to wit, on the 25th day of February, 1937, there was duly filed in said Court, and entered of record therein, findings of fact and conclusions of law, in words and figures as follows:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore been tried by the court without a jury and the court now being fully advised makes and adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

Plaintiff is a corporation organized and existing under the laws of the State of Oregon and is a citizen and resident of the State of Oregon. Defendant is a corporation organized and existing under the laws of the State of Wisconsin and is a citizen and resident of the State of Wisconsin.

II.

This action is one of a civil nature between citizens of different station and the amount in controversy exceeds the sum of $3000, exclusive of interest and costs.

II.

On or about October 15, 1925, plaintiff and defendant entered into a written contract for the construction by plaintiff for defendant of a line of railroad from Orofino, Idaho, following the course of Orofino Creek to a point named [151]

Headquarters, Idaho. The contract was in writing and there accompanied it complete specifications describing the manner in which the clearing, grubbing, grading, bridging, tracklaying, ballasting, and all other elements of the work were to be done, and prescribing unit prices for each type of work carried on.

IV.

Performance of the contract was sublet by the plaintiff to various subcontractors, and the plaintiff advanced the necessary funds to enable the subcontractors to perform the work. In accordance with the provisions of the contract, the subcontractors and the division of the work among them was approved by the defendant.

V.

The contract between plaintiff and defendant did not provide for the handling of any specific amount of yardage nor for the construction of any stated number of bridges, or tunnels, or changes in the channel of Orofino Creek, but for all of the work of every kind necessary in the construction and completion of a branch line of railroad from Orofino to Headquarters, plaintiff was to be paid for all the work done at the unit prices applicable to the particular type of work, as specified in the contract.

VI.

At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other

prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer's estimate of quantities of material [152] to be removed, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad.

VII.

In the construction of the railroad there were two instances in which a change of line was directed by defendant. This resulted in leaving the route originally surveyed and constructing the line upon a different location. There were many other instances in which the line was not constructed exactly as indicated by the location survey, and the number of bridges built and the number of channel changes made differed from those indicated by the preliminary data supplied to bidders. But the work actually done by defendant was the work contracted for and was not a change of the line and grade of railroad contracted to be built, or of the work embraced in the contract.

VIII.

Plaintiff in the performance of the contract handled a much greater amount of yardage than that shown by the estimates made by the locating engineer and shown on the preliminary data supplied to plaintiff and other prospective bidders prior to

the making of the contract. But the yardage so handled by plaintiff was the work which it contracted to do at the unit prices applicable and was not additional work resulting from any change in the line or grade of railroad or the amount of work embraced in the contract. [153]

IX.

The contract between the parties contemplated and required the construction of bridges such as those actually built by plaintiff and its subcontractors in the performance of the work, both with respect to foundations and superstructure. No change was required by defendant in this class of work from what was contemplated when the contract was entered into.

X.

The additional yardage, the increased number of channel changes, the decreased number of bridges, whether changes from the work contracted for or merely changes from preliminary estimates made before the contract was entered into, did not make the unit prices of the contract inapplicable and did not affect such prices within the meaning of the provision of the contract authorizing changes in the work.

XI.

Plaintiff did not, during the progress of the work or at its conclusion or at any time, represent to the chief engineer of the defendant that changes had been made in the line or grade of railroad, or in the amount of work embraced in the contract, or that the cost of the work or unit prices stated

in the contract had been affected by any such changes, and plaintiff did not at any time invoke action of the chief engineer of defendant under the provision of the contract authorizing changes in the work. The "substantial justice" clause of the contract is applicable to the contract as a whole; no cost accounting sufficient for the application of this clause is before the Court. [154]

XII.

Defendant's chief engineer at no time made any determination that changes had been made by defendant in the line or grade of the railroad contracted to be built or in the work embraced in the contract, or that the cost of the work covered by the contract had been affected by reason of any asserted changes.

XIII.

Defendant's chief engineer, at the conclusion of the work, proposed to pay plaintiff the sum of $80,000, less an offset of $20,000 claimed to be due from plaintiff for car rental and demurrage. Said proposed payment was not an acknowledgment or recognition of any claim by plaintiff for an increase of prices or for additional compensation under the provision of the contract authorizing changes in the work, but was an offer of compromise in settlement of all claims of plaintiff, and was conditioned upon its acceptance by plaintiff as a full and complete settlement in satisfaction of all of its claims.

XIV.

The contract provisions with respect of special classification are

> "Special Classification may be established at the option of the Chief Engineer and with the consent of the Contractor when material in substantial quantities is encountered of such character that it can not in his opinion be properly classified in any of the above defined classes.
>
> "Unit prices, for such material to be fixed by the Chief Engineer with due regard to prices stipulated in the contract for materials covered by contract classification."

In performing said contract a conglomerate material [155] was encountered in substantial quantities, much of it in the deep excavations for channel changes, and was given a special classification by the defendant's chief engineer, who allowed additional compensation for moving same. Said allowance is found to have been made in good faith and to be reasonable.

XV.

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the rail-

road right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of $10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant aserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

"NORTHERN PACIFIC RAILWAY COMPANY
Engineering Department
St. Paul, Minn. July 8, 1927.

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the [156] northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and

other materials required for completion of your contract north of that point.

Yours truly,

H. E. STEVENS"

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

"NORTHERN PACIFIC RAILWAY COMPANY

Orofino, Idaho
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho
Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headlock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit,

without cost to your company, rail and other material required for the completion of your contract.

Yours truly,
H. M. TREMAINE,
Assistant Engineer."

This was answered by Twohy Brothers as follows:

[157]

"Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,
TWOHY BROTHERS COMPANY,
By "

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last

portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do it [158] was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927.

XVI.

By permission of the defendant, the plaintiff continued the contract beyond the stipulated time and the defendant accepted the work, but the defendant did not permit the plaintiff to conduct any commercial hauling over the portions of the road taken over by the defendant.

XVII.

The right to the commercial haul was not submitted to the Chief Engineer for decision, was not a matter for submission under the contract, and taking the haul from the plaintiff was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. Before this position, the Chief Engineer obtained advice from the attorneys for the defendant. There is neither pleading nor proof of estoppel against or waiver by the plaintiff.

XVIII.

It was admitted at the trial that the total number of car miles of commercial freight at $1.00 per car mile transported by defendant over the line under construction July 17, 1927, to October 25, 1927, amounted to $304,301.08, and July 17, 1927, to December 31, 1927, amounted to $443,184.70. The auditor found the fair cost of such transportation by plainitff would have been $72,209.95 for the [159] shorter period, and $120,111.60 for the longer period. The Court approves these findings, but the Court finds that the plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; that the plaintiff was prepared to conduct such haul, and was damaged in the sum of $125,000 by being deprived thereof up to September 1, 1927; that the right to conduct said commercial haul terminated on that date. The Court further finds that plaintiff's pleadings do not present the

issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927.

XIX.

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile	$ .02
Hauling timber furnished by the company per thousand feet b.m. mile	.85
Hauling metal fastenings per ton mile	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount, leaving unpaid and due to plaintiff on this item $26,843.47. The plaintiff hauled piling furnished by [160] the defendant for which the plaintiff should have been paid $5353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item $4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2563.31. The defendant has

paid but $1313.62 of this amount, leaving unpaid and due the plaintiff on this item $1249.69.

XX.

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX was not submitted to the chief engineer for decision, was not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff.

XXI.

At the hearing before the auditor on February 13, 1930, it was stipulated that upon the final estimate, exclusive of the facts hereinabove found, there was due on the so-called "book-accounting" to the plaintiff from the defendant, the sum of $8865.75. The said stipulation of the amount due constituted an account stated, and therefore interest should be allowed from the date thereof. On February 3, 1932, the defendant filed in this court and cause an offer of judgment in the following terms, omitting title:

> "Now comes defendant, Northern Pacific Railway Company, and offers to allow judgment to be given against it and in favor of plaintiff herein for the sum of $9365.75, with interest thereon at [161] the rate of 6% per annum from February 1, 1928, in which sum

defendant acknowledges itself to be indebted to plaintiff, and for the further sum of $500.00 together with costs accrued to this date and such other costs as may be incurred in entering the judgment.

Dated December 29, 1931."

The item of $8865.75 is allowed, with interest at the rate of six per cent per annum from February 13, 1930.

XXII.

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiff is not entitled to any recovery on its so-called construction claim.

II.

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct

the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company [162] and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of $8,865.75
with interest thereon at six per cent per annum from February 13, 1930

On the commercial haul, the sum of 125,000.00
with~~out~~ interest prior to judgment

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers $26,843.47
For hauling piling 4,693.29
For hauling bridge metals 1,249.69
without interest prior to judgment

III.

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred.

Dated: February 25th, 1937.

JAMES ALGER FEE
Judge

[Endorsed]: Filed February 25, 1937. [163]

And afterwards, to wit, on Thursday, the 25th day of February, 1937, the same being the 91st judicial day of the regular November, 1936, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[164]

[Title of Court and Cause.]

JUDGMENT

The above entitled cause having been tried to the court without a jury, a jury having been waived in writing, and the court having made and filed its findings of fact and conclusions of law, now on motion of plaintiff it is

Ordered and adjudged that plaintiff have and recover of and from defendant the sum of $170,390.58, and its costs and disbursements herein taxed at $1632.61, and that execution may issue therefor.

Dated February 25, 1937.

JAMES ALGER FEE
Judge

[Endorsed]: Filed February 25, 1937. [165]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, defendant's bill of exceptions, in words and figures as follows, to wit: [166]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS

INTRODUCTORY STATEMENT

Be it remembered that this action came on for trial before the Honorable James Alger Fee, District Judge sitting without a jury, on the 21st day of May, 1936. The trial was concluded and the case submitted for decision on the 25th day of May, 1936. A written stipulation waiving a jury had theretofore and on the 29th day of April, 1936, been duly filed. DeLancey C. Smith, Esq., and Messrs. McCamant, Thompson & King (the latter having theretofore been substituted for Messrs. Wilson & Reilly) appeared on behalf of plaintiff and Charles A. Hart, Esq., and Messrs. Carey, Hart, Spencer and McCulloch appeared on behalf of defendant.

Thereafter and on the 4th day of January, 1937, the Court announced in an oral opinion a decision of the questions of law and fact involved in the action; and thereafter and on the 25th day of February, 1937, findings of fact and conclusions of law were duly made, adopted and filed, and thereupon and on said 25th day of February, 1937, judgment was duly entered and adopted herein.

[167]

Thereafter and on the 27th day of February, 1937, and during the same term of court in which the judgment was entered and docketed, the following order was made extending the time for presenting and settling bills of exceptions herein and extending for the purpose of such presentation and settlement the term in which the judgment was entered:

(Title)

"Upon application of defendant,

It is Ordered that the time within which either party hereto may submit a bill of exceptions for allowance, certification and filing is hereby extended to June 1, 1937.

It is Further Ordered that the present term of court be and is hereby extended to June 1, 1937, for the purpose of submission, allowance, certification and filing of bill of exceptions in this action, and for the purpose of granting any further extension of time which the Court may order.

Dated February 27, 1937.

JAMES ALGER FEE,
District Judge"

Prior to the trial of this cause and on the 17th day of September, 1929, an order was made by the Honorable Robert S. Bean, then District Judge, referring the cause to an Auditor and Special Master for a preliminary hearing upon the questions of

fact involved. Such a hearing was had and thereafter and on April 23, 1931, the Auditor and Special Master filed his report, and subsequently and on December 5, 1931, filed a supplemental or summarized report. With the first report there was filed a complete transcript of the evidence received and all of the proceedings had at the hearing before the Auditor and Special Master. Between the filing of the first report and the filing of the supplemental report, the Honorable Robert S. Bean died and the case was transferred [168] to the Honorable John H. McNary, then District Judge. After the filing of the supplemental report, the case was transferred to the Honorable James Alger Fee, District Judge.

Objections to the reports of the Auditor and Special Master were thereafter filed by plaintiff and defendant thereafter filed a motion to modify and correct said reports, said objections and motion being submitted to the Court on March 8, 1932. Thereafter the Court announced its readiness to dispose of said objections and motion in order to make the reports of the Auditor and Special Master available for use at the trial of the cause, but no action was taken thereon or to bring said case for trial until substituted counsel for plaintiff, on November 4, 1935, filed a motion for leave to serve and file an amended complaint in the action. Said motion was thereafter granted, subject to conditions imposed, which conditions were not accepted by plaintiff, and the case was thereafter set for trial upon the original pleadings, subject to certain amendments

made by interlineation upon stipulation of counsel at the time of trial.

Before the trial and on April 29, 1936, a stipulation was entered into between the parties and duly filed, providing for the admission at the trial of the testimony offered by the respective parties at the hearing before the Auditor and Special Master. Said stipulation, omitting title and signatures, is as follows:

> "It is stipulated that at the trial of the above cause the testimony of any witness given before the auditor may be read by either party from the transcript thereof, whether or not said witness is personally present in court, and whether or not such witness testifies in person at the trial. When so read such testimony shall be considered as testimony offered at the trial by the party [169] who called such witness to testify before the auditor. If any part of the testimony of any witness given before the auditor is offered at the trial, all of the testimony given by such witness before the auditor shall be considered as included in the offer. All objections to testimony made during the hearing before the auditor shall be considered and ruled upon by the court, and exceptions to the court's ruling will be considered as having been taken. No other objections to testimony shall be offered.
>
> Dated April 29, 1936."

Thereafter and at the trial of the cause before the Honorable James Alger Fee, District Judge,

plaintiff offered in evidence the testimony given by each witness for plaintiff, and all of the exhibits offered therewith, at the hearing before the Auditor and Special Master, and defendant offered in evidence the testimony given by each witness for defendant, and all of the exhibits offered therewith, at said hearing before the Auditor, all as shown by the transcript of testimony and exhibits filed with the Auditor's report; said evidence and exhibits were thereupon received in evidence by the Court, subject to objections made thereto during the hearing before the Auditor. No additional testimony was offered by either party and the cause was finally submitted to the Court on May 25, 1936.

STATEMENT OF DEFENDANT'S EXCEPTIONS.

I.

During the progress of the trial and before the final submission thereof, defendant submitted to the Court a motion to make and adopt the following, among other, Findings of Fact and Conclusions of Law

Requested Findings of Fact

"XV.

Under the terms of the construction contract, [170] plaintiff was required to complete ballasting and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with

respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

"To the decision and order of the Court refusing to make and enter Finding of Fact No. XV in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"XVI.

Defendant made no commitment of any kind to anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

"To the decision and order of the Court refusing to make and enter Finding of Fact No. XVI in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"XVII

Plaintiff, during the negotiations leading up [171] to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with the defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of $1.00 per car mile therefor."

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

> "To the decision and order of the Court refusing to make and enter Finding of Fact No. XVII in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

Requested Conclusions of Law.

"II.

> Plaintiff was not entitled, under its contract with defendant, to retain possession of any part of defendant's branch line railroad, after tracklaying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof."

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant duly reserved an exception, which was allowed by the Court in the following words and figures:

> "To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. II in the form duly requested by defendant prior to the time of final submission of this cause to the Court." **[172]**

"III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after tracklaying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time."

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant duly reserved an exception, which was allowed by the Court in the following words and figures:

"To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. III in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor."

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant reserved an exception, which was allowed by the Court in the following words and figures:

> "To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. IV in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"V

"Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover [173] upon its claim for damages for alleged breach of contract in this particular."

The Court refused to adopt the foregoing Conclusion of Law and to such refusal defendant reserved an exception, which was allowed by the Court in the following words and figures:

> "To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. V in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

The Court, after submission of the cause and after consideration thereof, and after announcement of a decision thereon, made and entered the following Findings of Fact and Conclusions of Law:

Finding of Fact

"XV

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of $10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

'NORTHERN PACIFIC RAILWAY COMPANY

Engineering Department
St. Paul, Minn. July 8, 1927.

Twohy Brothers Company,
General Contractors,
Orofino, Idaho. [174]

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. STEVENS'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop

work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

'NORTHERN PACIFIC RAILWAY COMPANY

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype Siding and the east switch of Summit Siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and other material required for the completion of your contract.

Yours truly,
H. M. TREMAINE,
Assistant Engineer.' [175½]

This was answered by Twohy Brothers as follows:

'Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,
By '

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plain-

tiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took posession of each portion of the road in this finding mentioned, the work required of the paintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927." [175]

The defendant thereupon reserved an exception to said Finding of Fact No. XV of the Court, which was duly allowed by the Court, said exception being in words and figures as follows:

"To the conclusion and decision of the Court stated in Finding of Fact No. XV to the effect that the contract between the parties gave plaintiff the right to conduct commercial haul while the line was under construction, and was breached by defendant in the manner stated in said finding of fact; and to the conclusion

stated in said finding of fact that plaintiff was entitled to conduct log transportation for Clearwater Timber Company as commercial business."

Conclusions of Law

"II

Defendant breached its contract by taking over as uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of with interest thereon at six per cent per annum from February 13, 1930	$ 8,865.75
On the commercial haul, the sum of without interest prior to judgment.	125,000.00
For hauling materials, plaintiff is entitled to recovery as follows:	
For hauling timbers	$ 26,843.47
For hauling piling	4,693.29
For hauling bridge metals	1,249.69

without interest prior to judgment." [176]

The defendant thereupon reserved an exception to said Conclusion and decision of the Court, which exception was duly allowed by the Court, said exception being in words and figures as follows:

> "To Conclusion of Law No. II that defendant breached its contract in the respects therein stated and that plaintiff is entitled to recover the amounts specified in said Conclusion of Law No. II."

"III.

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred."

The defendant thereupon reserved an exception to said Conclusion of Law, which exception was duly allowed by the Court, and which exception was in words and figures as follows:

> "To Conclusion of Law No. III that plaintiff is entitled to have judgment against defendant for the amounts specified in Conclusion of Law No. II."

The following is the evidence necessary for a consideration of the questions of law involved in the rulings to which the foregoing exceptions were reserved:

STATEMENT OF EVIDENCE—I.

Testimony of

HUGH M. TREMAINE,

a witness called on behalf of plaintiff.

Witness is a civil engineer in the employ of Northern Pacific Railway Company, with eighteen years of service with that Company, including operations both before and after Federal control of railroads. He was the engineer in charge [177] of the construction of the Orofino Branch. Said construction work was covered by documents identified as plaintiff's Exhibit 19, being contract between Northern Pacific Railway Company and Twohy Brothers Company, dated October 15, 1925, and supplemental contract between the same parties, dated April 26, 1927, with transmittal letters from the chief engineer of the Railway Company. Plaintiff's Exhibit 19 is identical with Exhibits A and B of defendant's answer herein, and alleged in said answer to have been executed by the parties, which said allegation is admitted by plaintiff's reply. For this reason Exhibit 19 is not reproduced here.

The said contract between the parties to this litigation was prepared and written by Mr. H. E. Stevens, chief engineer of the defendant company.

Exhibit 20 is a letter written by the witness to Twohy Brothers Company on April 3, 1928, with statement of cars of commercial business handled by the Railway Company between July 17, 1927, and January 1, 1928. The cars shown on the statement include all commercial business handled on the new line taken over, both log traffic and other

(Testimony of Hugh M. Tremaine.)

business from which revenue was received. Thirty cars of rails sold to Clearwater Timber Company and transported to point of delivery are not included.

PLAINTIFF'S EXHIBIT 20

is as follows:

"Twohy Bros. Company,
Orofino, Idaho.

Gentlemen:

In accordance with the request of Mr. Horan of April 2nd, attached please find a statement showing cars of logs hauled off the Orofino Branch by the Northern Pacific Railway Company in the period July 17, 1927, to January 1, 1928.

Yours truly,
H. M. TREMAINE,
District Engineer. [178]

STATEMENT OF CARS AND MILEAGE TWO WAYS FROM OROFINO TO JAYPE AND INTERMEDIATE SPURS—JULY 17, 1927 TO JANUARY 1, 1928.

Whiskey Spur	Fohl Spur	Olson Spur #1	Olson Spur #2	Haley Spur	Placer Spur	Jaype	Cars	Miles	Car Miles
47								6.99	328.53
	72							12.08	869.76
		37						24.13	892.81
			42					25.30	1,062.60
				2				38.57	77.14
					11			43.71	480.81
						7663		57.35	439,473.05
47	72	37	42	2	11	7663	7874		443,184.70"

Testimony of

JAMES F. TWOHY,

a witness called on behalf of plaintiff.

The officers of Twohy Brothers Company are witness' brother John D. Twohy, president, Philip Twohy, vice president, the witness, James F. Twohy, secretary, and a Mr. Wiley, treasurer.

The bid submitted by Twohy Brothers was prepared by Mr. M. S. Boss, superintendent of Twohy Brothers Company, and was submitted by said Mr. Boss and said James F. Twohy, and was the bid upon which the contract of October 15, 1925, with defendant, was made.

Witness was living in Portland, Oregon, during the construction period and was in and out of the location of the work from time to time. Mr. Boss, the superintendent, was in charge all the time. In August, 1926, witness went to St. Paul for the purpose of requesting an advance of $50,000 on retained percentage for work theretofore done on the contract. The witness saw Mr. Stevens in his office, obtained the allowance of retained percentage which he was after, and then when he was about to leave the Stevens office, [179] the latter asked witness what he wanted to do about the log haul. Witness asked what Mr. Stevens meant. Whereupon the latter stated that he had written a letter to Twohy Brothers with respect of the log haul in the following year, and had received a communication from the construction engineer, Mr. Tremaine, regarding the payment for hauling bridge timbers, and wanted to know what the contractor wanted to

(Testimony of James F. Twohy.)

do about that and what the contractor's attitude was on that subject. Witness told him he had not seen the letter and had not participated in any discussion out West but that his idea was that the contract would govern and whatever the contract said would probably be a satisfactory guide for the contractor.

Witness at that time had not participated actively in the work, the work being actually and directly in charge of Mr. Boss. He was superintendent in charge of the work and had a participation in the profits. He was very competent. Witness kept track of the job naturally with anxiety and interest but had not consulted the contract nor looked at it from the time he had signed it.

Mr. Stevens regarded the answer of witness as somewhat challenging and apparently thought witness should not take such a position. In answer to a query as to what Mr. Stevens then said, the witness stated:

> "Well, he said that if I elected or thought it proper to stand literally on our contract he would advise me to read it again, because it certainly provided him with much more advantage in any literal interpretation of the contract than it did us."

This statement was made aggressively, hotly. Witness answered Mr. Stevens that he did not mean to be challenging him, that he was not familiar with the thing in its particulars, but that his idea as a contractor was that the Chief [180] Engineer was

(Testimony of James F. Twohy.)

the authority on a job, and that witness was not beginning a job with many difficulties by challenging his authority.

At that time serious difficulties were developing on the job. It was expanding rapidly in size and the volume of material was already mounting way beyond what either side had expected,—"what we expected anyway." The contractor was in trouble over bridge matters and the job in general was taking on the look of a tough and difficult job.

Witness arrived in St. Paul in the morning and left the same evening. On the way west on the train he wrote a longhand personal letter to the chief engineer, which is dated August 17, 1926, and is in evidence as Exhibit 32. Said letter reads as follows:

PLAINTIFF'S EXHIBIT 32

"I have been somewhat troubled about our brief and rather hurried discussion in your office on Friday, on the subject of a hauling price on bridge material, and also on the subject of operating the line between June 1st, and Sept. 1st, hence this personal word to make my position quite clear.

I have not seen any correspondence on the subject referred to, nor looked at our contract since I signed it, but my attitude is simply that you are to write the ticket and we to follow it. We are to build this line to your full satisfaction, and in all the activities and operations involved in that program we wish to comport our-

(Testimony of James F. Twohy.)

selves and expect to be treated as a Department of the Northern Pacific under your direction, serving and advancing in every way we can the best interest of the company. I do not mean to imply, of course, that our contract does not substantially define and specify our duties, nor that we would ever seek to foist on you any of our proper responsibilities under it. I only want you to know that I regard our contract not as a strait jacket preventing any free modifications for the benefit of the work, and certainly not as a kind of legal fish-pond to hook advantage out of, but simply as a mutual written understanding, as exact and detailed and specific as it can possibly be made in advance, which sets out the method and time and price governing a complicated job we agree to do for you. [181]

Under its letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretative complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including these two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the

(Testimony of James F. Twohy.)

general principle governing all of us and underlying the whole contract.

You may feel this note unnecessary, in your 'down-Maine' way, and perhaps it is, but I write it because I know how often misunderstanding can color even a sound and cordial relationship for lack of free and frank expression.

Let me thank you again for the prompt and courteous release of the $50,000.00 which was much appreciated and will help us materially on the job."

The subject of commercial haul came up next at a meeting in Mr. Stevens' office in St. Paul in November, 1926. By this time the job had gone from bad to worse and the contractor had very serious difficulties on it, financial and physical, and was struggling with the weather, and some of the subcontractors were at a cracking point, and on many points the contractor felt it had matters for the chief engineer to pass on and claims it wished to submit to him. The following testimony was then given by the witness (Tr. pp. 184-185):

"A. By November of 1926 the job had gone from bad to worse and we had very serious difficulties on it, financial and physical, and we were struggling with the weather, and some of our subcontractors were at a cracking point, and on many points we felt we had matters for

(Testimony of James F. Twohy.)

the chief engineer to pass on and claims we wished to submit to him and discussions we wanted to have with him, with a view to getting the situation somewhat improved.

Q. Now without detailing the merits of those claims, and confining yourself as far as possible to the consideration of one question at a time—we just took up this commercial freight and we might as well go on with it—what in that con- [182] versation was there relating to the hauling of the commercial freight?

A. Well, I was in his office with Mr. Boss the day after Thanksgiving for the purpose of submitting a number of claims to him, among others a claim for change in bridge plans and the difficulties our bridge sub-contractors were having as a result of it, and the discussion was brief because of another matter and only lasted an hour or so and we didn't go into these particulars and were not able to as to the whole nature of our claim but Mr. Stevens asked me what the difficulties were in general, and I said, 'Well, among other things our bridge men are having a terrible time out there and are about ready to crack. They are heavily in debt and in the hole, and their morale is broken and their spirit is shaken and they need some assistance. They need some treatment of these claims without too much delay.' And he said, 'Well, they are probably hollering too soon.

(Testimony of James F. Twohy.)

Those fellows may make a whole lot of money.' And I said, 'Why, you are probably referring to the log haul next summer, but they can't live that long; they will sink before then.'

Q. What did he say to that?

A. I don't remember what he said. He shrugged his shoulders, or the subject passed off. There was nothing further said. That conference was broken up by the fact that he was leaving that night and we didn't have much time."

There was no further discussion of the subject of commercial haul until in the summer of 1927. At this time the log haul was about ready to come up, would be due within a few weeks, and the line was about ready to move logs, and there had been discussion among the contractors and subcontractors of rumors that the Northern Pacific proposed to take the log haul away from the contractor. In June, 1927, Mr. Stevens visited the work in Idaho, went over the line, and the witness rode to Portland with him on the train. At that time Mr. Stevens stated to witness "that he was going to take that log haul over for themselves, the Northern Pacific proposed to take it over, and I told him that we proposed to ob- [183] ject."

With respect of the understanding mentioned in Exhibit 36 hereinafter quoted, the witness stated that the understanding had in Mr. Stevens' car

(Testimony of James F. Twohy.)

when he said he was going to take the logs away from the contractor was that the contractor was going to protest in accordance with law and legal advice, but not with guns or rocks or anything of that kind, and if Mr. Stevens would tell the witness what his plan was the contractor would undertake physically not to blast the plan.

Prior to this time the Twohy Company, through its subcontractor Pacific Utilities Company, had made preparations for the hauling of logs. This subcontractor had notified the Twohy Company at the end of May that they were prepared to haul logs and would object to having the log haul taken away from them. Witness told the subcontractor that the Twohy Company expected the subcontractor to haul the logs and Mr. Boss also told them to make the necessary preparations. The subcontractor, Pacific Utilities Company, had handled all commercial business, including the hauling of logs, up to this time.

Exhibit 33 is a letter dated May 29, 1927, from Pacific Utilities Company (subcontractor) to Twohy Brothers Company, reading as follows:

PLAINTIFF'S EXHIBIT 33.

"Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

During the past sixty days we have frequently heard that it is the intention of The North-

(Testimony of James F. Twohy.)

ern Pacific Railway Co. to take the log haul away from us, when the track reaches Jaype. This would constitute a strict violation of our contract, which we hereby protest against most emphatically. [184]

Since June 1926 we have worked day and night building bridges and laying track whenever the grade was ready. We have erected bridges between unfinished cuts; laid track on almost impossible mud cuts and fills, at a great loss of money, but with the fixed purpose of laying track to Jaype by June 1st, 1927. We have suffered delays running into months, causing us to do the major part of our work under the most adverse conditions; Storms, snow, rain and mud. All of the bridge work in particular has been pushed in the extreme. We have used almost superhuman effort to erect bridges to permit tracklaying, then followed up with the permanent decking and other back work.

All bridge back work was done at an increased cost, while on track work, absolutely all of it was extra cost for the track organization was prepared, by the very nature of it, to complete such work as the laying progressed. The tracklaying was completely organized and disbanded many times, to say nothing of the other tie ups when not necessary to disband. This loss runs into thousands of dollars.

(Testimony of James F. Twohy.)

We suffered the hardships of strenuous efforts, and loss of money for none of these operations were economical, all being sacrificed in the interest of speed, and since it is anticipated that there is a chance to make a dollar from the log haul, we should not be deprived of that opportunity.

We are prepared to begin hauling logs as soon as the track is laid to Jaype and the surfacing done.

We await your assurance that the log haul will not be erased from our contract.

Yours truly,

Pacific Utilities Co."

Exhibit 34 is a letter dated June 17, 1927, from Twohy Brothers Company to Pacific Utilities Company, with carbon copy to Mr. H. M. Tremaine, reading as follows:

PLAINTIFF'S EXHIBIT 34.

"Pacific Utilities Company,
Postoffice Box 876,
Orofino, Idaho.

Gentlemen:

Replying to your letter of May 29th, we hope to adjust the matter of log-haul with Mr. Stevens on his forthcoming visit to this job. We expect you to haul the logs at the prices named and in accordance with your contract

(Testimony of James F. Twohy.)

with us. Of course, [185] your contract with us is entirely contingent upon our contract with the Railroad Company, and we disclaim any responsibility to you for any curtailment or changes which the Northern Pacific may enforce. We feel, however, that even should the Railway Company take over this haul for any reason, it would only be done for the good of the work and with due regard to the rights of yourselves and all concerned.

Yours truly,
TWOHY BROTHERS COMPANY."

PLAINTIFF'S EXHIBIT 35

is a letter dated June 19, 1927, from H. M. Tremaine to Twohy Brothers Company, reading as follows:

"Twohy Bros. Company,
Orofino, Idaho.

Gentlemen:

Beg to acknowledge receipt of your letter of June 17th enclosing copy of letter received from the Pacific Utilities Company together with copy of your reply.

Yours very truly,
H. M. TREMAINE,
Assistant Engineer"

(Testimony of James F. Twohy.)

PLAINTIFF'S EXHIBIT 36

is a letter dated July 8, 1927, from H. E. Stevens to Twohy Brothers Company, reading as follows:

"Twohy Brothers Company,
General Contractors,
Orofino, Idaho.
Gentlemen

You are hereby notified to stop all work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,
H. E. STEVENS" [186]

(Testimony of James F. Twohy.)

PLAINTIFF'S EXHIBIT 37

is a letter dated July 14, 1927, from Twohy Brothers Company to H. E. Stevens, reading as follows:

"Mr. H. E. Stevens, Chief Engineer,
Northern Pacific Railway Company,
St. Paul, Minnesota.

Dear Sir

We acknowledge your letter of July eighth in which you notify us to stop work covered by our contract between Orofino and Jaype.

As explained we wish to offer no physical obstruction to the completion of this work, but on the contrary are anxious to conform in every way possible to your plans. However, the taking over of this section of the line, in accordance with your notice, in effect deprives us of the profits which should rightfully accrue to us under Item 72 of the prices for the work. Inasmuch as this deprivation is a violation of the letter and spirit of our contract, entailing serious loss to us, we feel obliged to protest against this action. To carry out the apparent terms of our contract, we have made all necessary preparations for hauling the logs which have been commonly understood would be offered by the Weyerhaeuser interests. Your anticipatory breach of our rights in this matter renders any further action futile, and we accord-

(Testimony of James F. Twohy.)

ingly yield to your express notice and desire, but without prejudice to any rights we may have under the contract, which said rights we now expressly assert on behalf of ourselves and our subcontractee, the Pacific Utilities Company.

Yours truly,
TWOHY BROTHERS COMPANY
By JAMES TWOHY"

PLAINTIFF'S EXHIBIT 38

is a letter dated October 7, 1927, from H. M. Tremaine to Twohy Brothers Company, reading as follows:

"Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th. [187]

In accordance with my conversations with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without

(Testimony of James F. Twohy.)

cost to your company, rail and other material required for the completion of your contract.

Yours truly,
H. M. TREMAINE
Assistant Engineer"

PLAINTIFF'S EXHIBIT 39

is a letter dated October 20, 1927, from Twohy Brothers Company to H. M. Tremaine, reading as follows:

"Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the premptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,
TWOHY BROTHERS COMPANY,
By JAMES F. HORAN."

Twohy Testimony (continued)

In July, 1927, there were twenty-five or thirty million feet of logs piled up along the line, prin-

(Testimony of James F. Twohy.)

cipally at Jaype. The contractor hauled one train load of logs and was paid for it under Item 72.

In preparation for handling commercial business, Mr. Horan (superintendent of Twohy Brothers Company) was in- [188] structed to ascertain where locomotives could be rented, and witness consulted with a machinery dealer in Portland and got an option on two locomotives. No additional equipment other than what the contractor already had was necessary. The Twohy Company had a couple of standard gauge locomotives on the job at the time.

Witness' next discussion with Mr. Stevens on the subject of commercial haul was in March, 1928, the line having been turned over to the Operating Department on January 1, 1928.

This conversation was in Mr. Stevens' office at St. Paul, witness having gone there to see him about the log haul and timber haul and any other adjustments necessary before the completion of the final estimate.

Witness told Mr. Stevens at this time that the estimate, so far as Mr. Tremaine's work went, so far as all of his engineering treatment was concerned, was satisfactory to the contractor and was fair and all right, but that Mr. Stevens ought to direct that there should be added to the estimate the amount due for the log haul and timber haul.

At this time witness was presenting only a claim on the log haul and timber haul, stating, however, that the bridge men had had substantial difficulties and were $150,000 in the hole and should be recom-

(Testimony of James F. Twohy.)

pensed under the contract. But witness told Mr. Stevens that if there was paid what was due on the log haul and the timber haul, this would be accepted in settlement of everything since the bridge men were the ones most involved, and in the greatest difficulties, and would participate in that. **[189]**

JAMES F. TWOHY,

Cross Examination

Witness' trip to St. Paul, in August, 1926, was to secure $50,000 out of the retained percentage. Mr. Stevens arranged for this payment. The letter of August 17, 1926, to Mr. Stevens was written on the train on the way back from St. Paul. Mr. Stevens' letter to the Twohy Company which Mr. Stevens referred to in the conversation in St. Paul, was not seen by the witness until his return to Orofino. The Stevens letter is Exhibit A-2.

DEFENDANT'S EXHIBIT A-2

is a letter from H. E. Stevens to Twohy Brothers Company, dated August 3, 1926, received August 5, 1926, and reading as follows:

"Twohy Brothers Co., TWOHY BROS. CO.
General Contractors, AUG 5 1926
Orofino, Idaho RECEIVED

Gentlemen:

I discussed with Messrs. Weyerhaeuser and Billings today, matter of handling logs from Jaype siding to Orofino prior to completion of

(Testimony of James F. Twohy.)

the construction, and they advise me they plan to cut about 35,000,000 ft. provided they have definite assurance from us that we will be in position to handle the logs to their Lewiston Mill beginning on June 1, 1927.

I advised them that barring some major contingency which could not be anticipated, we expected to have the line in shape to handle logs in quantities on that date.

If their plans develop as anticipated, it will mean the handling of about 60 cars per day in each direction, or at least two trains with heavy power.

I think it would be advisable for the Railway Company to take over the operation and maintenance of the line to Jaype on the date these log movements start even though this section may not be entirely completed. Will you, therefore, please advise if such an arrangement will be satisfactory to your Company.

Yours truly,

H. E. STEVENS" [190]

Witness does not know whether he went to Orofino just before going to St. Paul (in August, 1926), but believes that he never saw Mr. Stevens' letter until his return from St. Paul. His first intimation that the log haul was in issue came from Mr. Stevens at St. Paul. No one told him of the receipt of Mr. Stevens' letter on August 5 prior to leaving for St. Paul, but Mr. Stevens, at the St. Paul meeting, explained that he had raised the question of the log

(Testimony of James F. Twohy.)

haul. The matter of the log haul was in the minds of the members of the contracting firm.

The conversation in St. Paul was brief, dealing first with the advance of $50,000. Mr. Stevens raised the question of log haul and the price for hauling bridge materials and asked the witness what he wanted to do. As stated by the witness, "I told Mr. Stevens—when he asked me what we were going to do about it, I said I assumed that the contract would govern on those matters, and that riled him up and he got sharp and hot on the subject, and he practically told me that if I was standing on a literal interpretation of the contract, that he would advise me to read it again because it gave him much more power than perhaps I realized." The statement in witness' letter of August 17, 1926, that the contractor was willing to leave all questions of interpretation to the judgment of the Chief Engineer related to the log haul question and the timber haul question, under the arbitration clause of the contract.

After the correspondence with the Pacific Utilities Company in the early summer of 1927 about the log haul, Mr. Horan (superintendent) made investigations and gave witness assurances that engines could be secured, the railroad [191] company would furnish the cars. No other preparations were necessary as the job was simply to take the empty cars at Orofino and haul them up for loading and then bring them back. The Pacific Utilities Company had already handled such commercial business as had been offered.

(Testimony of James F. Twohy.)

Mr. Horan was on a trip over the line when the decision was reached to transfer the line to the Operating Department of the Railway Company.

Prior to March, 1928, witness had been furnished with a tentative final estimate which had not yet been given to the Chief Engineer for approval. Witness' trip to St. Paul in March, 1928, was for the purpose of discussing settlement of the job, and witness discussed with Mr. Stevens the job in many of its features and phases, and the difficulties that had been encountered, but stated that he had no criticism of Mr. Tremaine's estimates, that he had fairly estimated the quantities and classification, and that his subordinates had been eminently fair in those particulars. At this meeting witness asserted the right of the contractor to have conducted the log haul, and to the compensation claimed for hauling bridge materials. At a subsequent discussion in June, 1928, Mr. Stevens discarded the log haul and timber haul discussion,—put it out of the discussion. The witness further testified as to this as follows:

> "We had a little exchange, as I testified yesterday, on the subject. We stood by our position that he had no right to take it away from us, and he stood on his that he had, and being of no advantage to carry that on further, we moved away from it." [192]

Testimony of

M. S. BOSS,

a witness called on behalf of plaintiff

Witness is a contractor by occupation and had been superintendent of Twohy Brothers Company for over twenty years and had superintended railroad construction on numerous railroads in the United States and Canada covering much difficult work. Witness had prepared the original figures for the bid of plaintiff for the Orofino Branch construction and was in charge of the job as superintendent until succeeded by James F. Horan in 1927.

Witness first learned, through a letter from Mr. H. E. Stevens dated August 3, 1926 (Defendant's Exhibit A-2), of the possibility of the Railway Company wanting to take any part of the railroad away from the contractor. Prior to August 3, 1926, there had been extensive logging done. In July, 1926, Mr. Stevens had been over the new line; at this time logs were being brought down and piled by the right of way, and spur tracks were being built into the woods in several places.

The letter from Mr. Stevens (Defendant's Exhibit A-2) apparently was mailed at Spokane and was received in due course about August 5. Mr. Twohy was in Orofino between the time of receipt of this letter and the time of his going to St. Paul. Witness drove to Kendrick on the night of the 8th and brought him across country in his car, a trip of about 50 or 60 miles. They arrived at Orofino at eleven thirty or twelve o'clock at night and Mr. Twohy left on the stage the next day at two o'clock

(Testimony of M. S. Boss.)

for Lewiston. The discussion while Mr. Twohy was in Orofino on this trip was about obtaining money from the percentage hold-back of the railroad [193] company, and there was no discussion of the log haul. Witness thinks the letter (Exhibit A-2) was then in possession of Mr. Lykken, the office man of Twohy Brothers. Witness did not communicate the contents of this letter to Mr. Twohy nor did he show him the letter. It was not until Mr. Twohy's return from St. Paul, a week or ten days later, that he was advised of the receipt of the letter. In the meantime while Mr. Twohy was in St. Paul the witness made an estimate of the probable cost of operating trains for handling commercial business and the probable revenue to be derived therefrom. Twohy Brothers never answered Mr. Stevens' letter of August 3, 1926 (defendant's Exhibit A-2), because the log haul was away off in the distance, months ahead, and the contractor had many other troubles.

Witness was in St. Paul in November, 1926, with Mr. James Twohy and there interviewed Mr. Stevens. The troubles of the bridge contractors were presented briefly, but there was only a hurried discussion because Mr. Stevens had to leave St. Paul immediately, and after a statement that these contractors were about ready to blow up and leave the work, Mr. Stevens said:

> "Well, I think they are hollering too soon, yelling too quick. They will probably make a lot of money on that log haul."

(Testimony of M. S. Boss.)

About the middle of December, 1926, Mr. Stevens came out to Orofino to discuss the matters which had been mentioned at the prior meeting in December which had not been concluded because Mr. Stevens had to leave. Witness stated that bridge timbers placed under water should be paid for at a special price. Mr. Stevens laughed at this and said it was out of the question and then said: [194]

> "I suppose that is like the log haul, you are hollering about that before you are hurt. In the final estimate when the work is completed all of these things can be adjusted."

At neither this nor any other meeting did the witness ever hear it asserted that any question touching the log haul had been submitted to arbitration and determined by the chief engineer, and the witness was never notified of any proposal to arbitrate any such question and never took part in any such arbitration and was never notified of any award or decision.

A question at this point was propounded to the witness as to when he had first heard it said or claimed that the matter had been arbitrated, and counsel for the railroad company, Mr. Hart, interposed this objection and made this statement:

> "I object to that question. There is not any claim of arbitration that I know of anywhere."

Witness is experienced in operating locomotives and trains in construction work and his estimate of

(Testimony of M. S. Boss.)

the cost of handling logs on the Orofino job by the contractor is based upon two trains of thirty cars each per day and on a ninety-day operation. Witness believes his estimate of all items entering into the cost is adequate.

Prior to the time witness left the work and before July 17, 1927, the contractors handled as commercial haul everything moved over the newly laid track except the Northern Pacific ditcher train and its log train, which was picking up logs cut off the right of way. The railroad thus picked up a few cars but the contractor hauled all others. The logs so picked up were scattered logs cut from the right of way [195] which the railroad was attempting to salvage. The Northern Pacific train engaged in picking up right of way logs also picked up some cars but the contractors objected and engineer Tremaine stopped this immediately. The logs picked up on the right of way had been lying on the ground since 1925 or early 1926 and there was very little salvage in them. The contractors handled all the commercial business they could get and in July 1927, were prepared to handle the log traffic. Witness offered to furnish a ditcher and train to operate same but Mr. Tremaine decided that the Railway Company would operate the ditcher. The commercial business handled by the contractor included cars of rail and material for Weyerhausers and some loggers and also some cars of perishable freight.

(Testimony of M. S. Boss.)

The final revised figures of the witness for the estimated cost of handling commercial haul are $595.90 per day. While $20,000 was added for contingencies in the actual operation, there were only some cars off the track on the first trip. Arrangements had been made for an adequate supply of water.

M. S. Boss,

Cross-Examination

The commercial hauling was sublet by Twohy Brothers to Pacific Utilities Company at sixty cents a car mile, which would leave a profit of forty cents a car mile for plaintiff. In the invitation to bid the chief engineer told the contractor to prepare to haul logs between June and September, and the witness had knowledge about the proposed logging of the Clearwater Timber Company and the amount of logs that would probably be hauled. Upon this knowledge witness reduced Twohy Brothers' bid for hard rock from $1.70 per cubic yard to 99 [196] cents per cubic yard at which price they did not expect to make much money on this item. The profile submitted with the invitation indicated the probable amount of solid rock work of which the witness in making his bid counted on about seven hundred odd thousand cubic yards. Reducing this bid price to 99 cents meant a difference of about $60,000 to the contractor which he hoped to make up on the commercial haul.

Mr. Stevens' letter of August 3, 1926, was the first intimation witness had that the Railway Company proposed to take over the first 29 miles of the road

(Testimony of M. S. Boss.)

as soon as track was laid. The witness thereupon testified in response to cross-examination as follows:

"Q. And you had that letter there in your office for three days before you saw Mr. Twohy; that is correct, is it?

A. I might not have been in the office when that letter was received.

Q. But I assume it wasn't very long before you did see it?

A. Not very long.

Q. After its arrival?

A. No. It would be brought to my attention.

Q. What did you say?

A. It would be brought to my attention pretty promptly.

Q. It was a matter of very, very great importance I judge, in view of the fact you say you had bid expecting to make a large gain out of this commercial haul?

A. At that time we didn't treat it very seriously.

Q. Oh. Why not?

A. Because we expected to haul the logs.

Q. Oh, well, Mr. Stevens statement that you were not going to be permitted to haul them was not treated seriously by you? Is that what you mean?

[197]

Mr. Reilly: Objected to, because there is no such statement in the letter.

Q. (By Mr. Hart) Well, what do you mean by saying that you did not treat it very seriously?

(Testimony of M. S. Boss.)

A. He merely requested us to give up that part of it and we never entertained anything—any idea of ever giving it up.

Q. He requested you to express yourselves as to whether or not that program would be satisfactory to you, did he not? That is, for the railway company—I am now reading from the letter—'for the Railway Company to take over the operation and maintenance of the line to Jaype on the date these log movements start even though this section may not be entirely completed.' That was what was put up to you by that letter?

A. Yes, sir.

Q. Now you say you didn't take that inquiry very seriously?

A. Not very seriously at that time. You know, we didn't figure it would ever be done.

Q. And you never answered that letter, as I understand?

A. No.

Q. You knew at the time, I suppose, what it would mean to you in dollars and cents if that plan was carried out?

A. Yes. I made computations on it soon after.

Q. Within a day or two?

A. Oh, in a few days; I would not say the exact days.

Q. And according to your computations, as you have already testified to them, you figured then it

(Testimony of M. S. Boss.)

would take away perhaps three hundred thousand dollars from you?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And then on the night of the 8th you met Mr. Twohy at Kendrick and drove him from Kendrick to Orofino; that is right, is it? [198]

A. Yes, sir.

Q. How long a drive is that?

A. It is about an hour and a half drive, I would say.

Q. And I assume you talked over the work generally?

A. We talked over principally the financial problem part of it, money.

Q. But this letter of Mr. Stevens' was not brought up at all?

A. I don't ever remember mentioning it.

Q. Well, that is not quite the statement you made on direct examination. Now you say you don't remember mentioning it. It was a matter of sufficient importance, so, I assume, you surely would have remembered mentioning it if it had been mentioned?

A. It wasn't the main importance at that time. We were not worrying about that then. We had lots of other troubles.

Q. The loss of three hundred thousand dollars was of minor consequence to you at that time, was it?

(Testimony of M. S. Boss.)

A. We never figured in the money at that time, three hundred thousand dollars.

Q. Well, between the third, or, rather, between the fifth and the eighth of August, when you say Mr. Twohy, you had made the figures so that you knew what it would mean to you, hadn't you?

A. I don't think that I had made those figures at that time.

Q. Well, let's come back for a minute again to the question of whether or not you talked to him on that automobile trip. The subject matter of that letter was of sufficient importance so that you believe now you would remember it if you had talked with him?

A. I think so, yes.

Q. And you feel sure that you did not talk with him?

A. I am pretty certain I didn't talk to him on it.

Q. Then he spent from about midnight of the 8th until two o'clock in the afternoon of the 9th at Orofino, did he? [199]

A. Yes.

Q. What was he doing there?

A. The most of that time he was with Mr. Tremaine, I think. He had us make, myself and Mr. Lykken make up some statements of accounts payable, and going back to see Mr. Stevens for money advance on our retained percentage, and he wanted supporting figures for that.

Q. And during all of that time up to the time of his departure at two o'clock on the 9th, are you just

(Testimony of M. S. Boss.)

as sure that you didn't mention the subject matter of this letter to him?

A. I don't think that I even knew that he had left at two o'clock. I don't think I was there. I went up the line a ways, or around, and he was gone when I came back, I know.

Q. All right. I will limit the question to the times when you did see him up to the time of his departure on the 9th. You are sure you did not bring the subject matter of this letter to his attention, are you?

A. Yes, sir.

Q. At this time it is not a question of remembering; you are sure?

A. As near as I can remember, I never brought that to his attention."

Witness' attention was called to the testimony of Mr. Twohy that Mr. Stevens stated the bridge men were hollering too soon, they might make a lot of money, and that Mr. Twohy said that he probably referred to the log haul, and the witness answered that it was his recollection that Mr. Stevens said they would make a lot of money or might make a lot of money out of the log haul.

In making estimates of the cost of handling the log traffic nothing was allowed for ditcher operation because this was force account work paid for by the Railway Company. [200]

The contractor had work trains and equipment adequate to complete the line beyond the 29 miles

(Testimony of M. S. Boss.)

taken over. If the Railway Company had not taken over the first 29 miles the contractor would have been required to haul all of the material required for the upper part of the work. The contractor had adequate work train equipment to do all such hauling. The log trains would have moved the bridge materials. It would have been work trains hauling logs and materials. Witness contemplated the use of 70-ton locomotives handling 30 cars, although helper engine service might have been required to haul 30 empties up the hill.

As the amount of commercial business developed, the log haul would have aggregated approximately four hundred odd thousand dollars, less $100,000 expense, or a $300,000 profit, but when submitting the bid for Twohy Brothers the witness figured on only enough log haul to offset the reduction in price for moving hard rock. They never figured the amount in dollars and cents, but estimated that the amount of commercial haul would justify the reduction in price for moving solid rock.

The contractor was not soliciting commercial business from the public but was prepared to haul any cars placed on the track at the direction of Mr. Tremaine or his subordinates. The contractor would be required to do clearing or ditcher work before the track was laid, but witness believes that after track was laid, such work was paid for as extra work. When the grade was finished in different locations, the engineer would pass upon the work and accept the grade. As fast as the grading work was

(Testimony of M. S. Boss.)

finished to sub-grade in each location, the engineer would pass upon the work and decide upon the acceptance of the grade.

Cars of logs on that line averaged about 7000 or 8000 feet. The average logs were small. [201]

The invitation to bidders was a letter written by the chief engineer, dated September 18, 1925, addressed to Twohy Brothers. This was introduced in evidence as

PLAINTIFF'S EXHIBIT 21.

It contains, among other statements, the following:

> "You will note we have specified that work be commenced immediately on award of contract, and that bridging, grading and track laying be completed on or before June 1, 1927. Balance of work to be completed on or before September 1, 1927. This line is to be constructed for the purpose of handling logs and forest products from the Clearwater timber belt to the large mills to be constructed at Lewiston, in connection with the power development work now under way at that point.
>
> The Clearwater Timber Company expect to have their new mill at Lewiston ready for operation in the early part of 1927, and as this will represent a very large investment it is important that the railway be in position to deliver logs to the mill on its completion. We have

(Testimony of James F. Horan.)

therefore specified that the track laying shall be completed not later than June 1. This will put us in position to start delivery of logs and a little additional time can be allowed for the finishing, ballasting and completion of the railway."

Testimony of

JAMES F. HORAN,

a witness called on behalf of plaintiff.

Witness is superintendent of Twohy Brothers Company and was in charge of the Orofino work beginning in the month of June, 1927. Twohy Brothers Company finished the actual construction of the line on October 25, 1927. All forces were laid off then and the outfit cars were moved from Headquarters to Orofino. No work was done thereafter except some extra work on force account. Witness remained at Orofino until March, 1928, repairing and reconditioning equipment, etc. The Camas Prairie Railroad, a subsidiary of Northern Pacific and Oregon-Washington Companies, took over the operation of the new line on January 1, 1928. From July [202] 15, 1927, on, the contractor had adequate water facilities for train operations. Trains of the contractor were operating over the first 29 miles of said road prior to July 17, 1927. After the Northern Pacific took charge of the first 29 miles, log trains

(Testimony of James F. Horan.)

were handled every day, the logs being delivered to the Clearwater Company at Lewiston.

Prior to July 17, 1927, Twohy Brothers Company had a crew of men lining track, ballasting, etc., on that part of the line between Orofino and Jaype. This crew did some track lining and similar work on this part of the line after July 17, 1927, for which the contractor was paid as force account. Prior to July 17, 1927, payment had been made under the contract. The Camas Prairie Railroad, a subsidiary of the Northern Pacific and Oregon-Washington companies, began operating the line on January 1, 1928. Witness does not know of any written notice given by the Railway Company that it would take over the line from Summit to Headquarters, although such notice was requested if the road was to be taken.

Prior to July 17, 1927, the subcontractor, Pacific Utilities Company, handled some commercial business on the line below Jaype. Some commercial business was hauled by the Northern Pacific locomotive and witness protested to Mr. Tremaine against this, and the railroad engineer furnished a statement of the business handled by the railroad company. Prior to the taking over of part of the line on July 17, 1927, the Northern Pacific moved commercial cars on the line a total of 564.36 car miles. On March 3, 1928, engineer Tremaine checked a statement prepared on behalf of Twohy Brothers Company, showing commercial cars handled

(Testimony of James F. Horan.)

by the Railway Company, and ascertained to what extent an accounting for them had been omitted in the estimate theretofore given the contractor. [203]

The Railway Company had locomotives on the line prior to July 17, 1927, to haul ballast, operate a ditcher, etc., and to pick up stray right of way logs; this was referred to as a "cherry picker."

Witness discussed with Mr. Tremaine the order signed by Mr. Stevens directing the taking over of the line from Orofino to Jaype. Mr. Tremaine had the notice in his possession for some time before serving it, Mr. Tremaine stated that the dates were left blank in the notice when it came from St. Paul and Mr. Tremaine was to fill in the dates.

James F. Horan,

Cross Examination.

Some of the Twohy equipment was used in December, 1927, the Railway Company paying a rental charge which included the wages of the operator. These items were included in estimates later rendered, classified as force account. The work in which this equipment was used continued until about the middle of January, 1928, and it was in charge of the Railway Company. Witness was at Orofino until March, 1928, arranging for storage of equipment which could not be moved out until spring.

Testimony of

H. L. LYKKEN,

a witness called on behalf of plaintiff.

Witness is an accountant and was employed by Twohy Brothers Company on the Orofino work.

According to information supplied by H. M. Tremaine, Northern Pacific engineer, there were 7530 cars of logs and 344 cars of other commodities handled between Orofino and Jaype by the Railway Company between July 17, 1927, and December 31, 1927. These cars were moved a total of 443,184.70 [204] car miles, which, at $1 per car mile, amounts to $443,184.70.

For the period between July 17, 1927, and October 25, 1927, there were handled by the Railway Company between the same points 5250 cars of logs and 62 cars of other commodities. These cars were moved a total of 304,301.08 car miles, which at $1 per car mile, amounts to $304,301.08.

Rumsey & Jordan, a subcontractor under plaintiff, finished their work on the first residency in August, 1926. The total allowance in estimates at the time of finishing this residency was $248,040.31. When the final estimate came in on this residency the total allowance was $324,661.81, showing a holdback of $76,623.50. The work on this residency was finished prior to August 31, 1926. Work on the second residency by Rumsey & Jordan was finished on or before December 31, 1926. The aggregate of the monthly estimates allowed on this work to its com-

(Testimony of H. L. Lykken.)

pletion, including the December estimate, was $264,895.04. The final estimate on this residency showed that the proper allowance was $310,104.96, or a hold-back of over $45,000.

Parker & Knowles, a subcontractor on residency No. 4, had its work practically completed January 31, 1927. The total contract on this residency was $228,413.55. The hold-back between the monthly estimates and the final estimate was over $45,000.

In each of the computations referred to above the witness took the monthly estimates, aggregated them, and compared the aggregate with the amount paid on the final estimate. The ten per cent retention by the Railway Company would be included in the difference. All payments were made to Twohy Brothers who in turn dealt with the subcontractors. [205]

Testimony of

H. E. STEVENS,

a witness called on behalf of defendant.

Witness is vice president of Northern Pacific Railway Company in charge of operation and maintenance, having held that position since August 10, 1928. His service with the Company began in 1904 as assistant engineer. In 1916 witness became chief engineer and held that position until he became vice president in August, 1928. During these periods witness had charge of a volume of construction work involving an estimated one hundred million dollars.

(Testimony of H. E. Stevens.)

At the time of the execution of the contract with Twohy Brothers Company on October 15, 1925, witness discussed the Twohy bid with Mr. Twohy and Mr. Boss, having before him a work sheet containing an analysis of all the bids as applied to estimated quantities, but this work sheet was not shown to Mr. Twohy or Mr. Boss. It disclosed to Mr. Stevens that the low bidders were Twohy Brothers and Stewart & Welch, but the former bid 99 cents for solid rock removal and the latter bid $1.08 for the same work. This involved upwards of 700,000 cubic yards, was an item in which an overrun was expected, and made the Twohy Brothers bid more attractive. Upon this work sheet, no quantities at all were set up for commercial haul, covered by price item 72. There were eleven bidders and the prices specified by the bidders for commercial haul ranged from 50 cents a car mile to $5 a car mile.

No commitment was ever given to the Clearwater Timber Company as to the time when logs would be accepted for transportation on the new line. The Timber Company frequently asked that a date be fixed but witness always took the position that the railroad would be ready to haul logs [206] by the time the Timber Company had its log pond ready to receive them.

When log hauling started, the Timber Company had less than half a head of water in its log pond. The pond was composed of a dam with a dike from the dam to the river bank, with the Northern Pacific

(Testimony of H. E. Stevens.)

tracks laid across the property. Additional trackage was constructed under a contract with the Inland Power & Light Company. Logs were dumped off a trestle at the easterly end of the pond. Later it was necessary to dump the logs on dry land. This continued until the logs piled up as high as the top of the trestle, and then logs were dumped off yard tracks at locations where they could later be rolled to the area which would be covered with water. The head of water was gotten up some time late in the fall, and then it froze up, freezing in those logs that had been dumped on dry land in front of the log pond, with the result that they did not get their works cleared away and in shape to operate until the ice broke up in January of that year, 1928.

The letter of August 3, 1926 (Defendant's Exhibit A-2), to Mr. Twohy was written under the following circumstances: Witness had made a trip over the line and had been down to Lewiston and gone over the work down there with officers of the Clearwater Timber Company who were urging him to fix a date when logs would be moved. Witness then wrote the letter to Mr. Twohy in order to develop what his attitude would be.

The Railway Company had contracted with Clearwater Timber Company to haul logs from any point on the line between Orofino and Headquarters to Lewiston at a rate of $2.95 per thousand feet, log scale. In the contract between Northern [207] Pacific Railway Company, Oregon-Washington Rail-

(Testimony of H. E. Stevens.)

road & Navigation Company, and Clearwater Timber Company, dated December 3, 1925 (Plaintiff's Exhibit 143), referring to the railroad to be constructed from Orofino into the timber, the following recital appears on page 6:

> "As the operation of said proposed railroad will necessarily be begun before the actual completion thereof in its permanent form, it is understood and agreed . . ."

The distance between Orofino and Lewiston is 43 miles. This rate of $2.95 is made up of two items—$1.65 for the transportation on the existing railroad (between Lewiston and Orofino) and $1.30 for the transportation on the new line. At this rate, payment for hauling a car of logs from any point on the new line to Orofino would be $9.75. At the rate of $1.00 per car mile claimed by the contractor, the payment to the contractor for the same transportation service would be $56.40. This is based upon payment of $1.00 per car mile in both directions on an average mileage of 56.4 car miles.

Mr. James F. Twohy called at witness' office in St. Paul about August 15, 1926. Witness first asked Mr. Twohy if he had seen witness' letter to Twohy Brothers Company of August 3, 1926 (Defendant's Exhibit A-2), about log transportation and Mr. Twohy answered that he had not. Witness then either showed him the letter or told him about it and explained his position. Mr. Twohy answered

(Testimony of H. E. Stevens.)

that he had not examined the contract and had not given the matter any consideration, but he thought the contract provisions would probably govern. The witness then recited said conversation as follows:

> "And, as he has recited, why, I became rather emphatic, that I didn't consider the log haul a [208] part of the construction contract, not so intended—left absolutely no doubt in his mind as to where I would stand on the log haul question from then on. And I also broached this letter that I had just received from Mr. Tremaine about the claim for team haul and told him with equal emphasis that I didn't propose to pay team haul prices for material that was hauled by train; that we could consider those two questions settled."

The conversation then turned to the subject of prices for team haul and to Mr. Twohy's request for an advance of $50,000.

Witness had no further discussion with Mr. Twohy upon this question until the following summer. Witness received no other reply to his letter of August 3, 1926 (Defendant's Exhibit A-2), than Mr. Twohy's letter of August 17, 1926 (Plaintiff's Exhibit 32).

Beginning in the fall of 1926, requests for additional compensation were made by the Twohy Company upon representations that the work was proving very expensive and the contractors were be-

(Testimony of H. E. Stevens.)

coming involved. In August an advance of $50,000 was made from the retained percentage and again in September another $50,000 was advanced.

Early in December, 1926, another advance of $30,000 was requested but not granted because the November estimate amounting to $121,000 was about to be sent on. The retained percentage was then about $57,000.

This retained percentage is not due until the contract is completed, and it gradually accumulates during the course of the contract, and this advance that witness spoke of was simply advance money before it was due and charging it off against the retained percentage to relieve the financial stringency. Along the latter part of November Mr. Twohy and Mr. Boss called on the witness in St. Paul and discussed a few general propositions without going into any detail in [209] particular, although the witness at that time asked them to state their business, if they had any, but as the witness was called East the next night, they decided that they would not open the subject and departed.

Referring to the testimony of witnesses Twohy and Boss about this meeting, witness testified as follows:

> "I have no doubt I probably said they were hollering before they were hurt, but no mention was made of log haul. The log haul wasn't in sight.

(Testimony of H. E. Stevens.)

As I have just stated, I probably said they were hollering before they were hurt. I made no statement about the log haul, because the question of log haul was very much taboo from the August meeting. But that conversation, to go on with that, was to the effect that I didn't care to consider making adjustments of a contract in the course of its procedure; that no one knew how a contract would show up in the final results; and I repeatedly made that statement in the subsequent conferences, that all these things should wait until we found out what the total result of the contract as a whole would be."

With reference to the claim of short-estimating, the witness testified as follows:

"Q. Was anything said at this time about the kind of estimates they were getting, whether they were liberal or otherwise?

A. I never had a kick on so-called short estimating, if that is what you have in mind.

Q. Well, what did you say to them about what you thought was the situation?

A. Well, as a matter of fact when this work did begin to show that it might result in a deficit to the contractor I had instructed Mr. Tremaine—— [210]

Mr. Reilly: We object to any private conversation between the witness and Mr. Tremaine, at which none of the Twohys' representatives were present.

(Testimony of H. E. Stevens.)

Mr. Hart: Yes. Instead of giving any instructions to Mr. Tremaine, you might tell what, if anything, was done, to your knowledge, by Mr. Tremaine, pursuant to those instructions.

A. He increased the estimates in every way we could. To put it flatly, we gave them everything in sight."

Witness went over the line on December 18, 1926, and had a conference with Mr. James F. Twohy and Mr. D. W. Twohy. Mr. James F. Twohy presented a financial statement of Twohy Brothers Company on the Orofino contract showing indebtedness for material and supplies of $219,680.26. Witness criticized this, particularly with reference to nonpayment of bills more than a year old, and asked what had become of the money paid by the Railway Company, which at that time was a little more than a million and a half dollars. After Mr. James Twohy had left the Stevens car, witness discussed at length with Mr. D. W. Twohy what could be done to pull the job through, Mr. Twohy urging that additional allowances be made and witness explaining that he had made all the allowances that were due under the terms of the contract. Mr. Twohy made known that the Old National Bank of Spokane, of which he was chairman, had taken an assignment of the construction contract, and witness thereupon stated that he would not advance a large sum of money through the bank as long as

(Testimony of H. E. Stevens.)

the bank held this assignment. Witness finally agreed to arrange for $100,000 additional to keep the Twohy Company on the job, as a matter of business expediency, providing his superiors would approve, and providing the assignment to the bank was released. For the purpose of making this allowance, [211] witness arranged to specially classify certain material at a fixed price of $1.20 per yard. The contractor had claimed that there should be allowances on special classification, bridge items and other things which the chief engineer had declined to recognize, as not in his judgment allowable.

Between January 1, 1927, and the middle of April, 1927, bi-monthly advances were made. On March 25, 1927, Mr. Twory wired asking for an advance of $30,000 from the retained percentage. This request was granted. At the end of March witness received a request through Mr. Tremaine for an additional $30,000. Then Mr. Twohy made a verbal request on Mr. Tremaine for an advance of $40,000. Witness directed Mr. Tremaine to decline this request. Mr. Twohy then wired, on April 8, 1927, urging that this advance be made and charged "adjustments due on bridge construction." Witness answered that he did not know of any adjustment due on bridge construction, and added:

> "My agreement with you was that an advance of approximately $100,000, plus bi-monthly estimates, would take care of your

(Testimony of H. E. Stevens.)

financial requirements. This advance has been made and is, I think, all the Railway Company should be asked to do toward relieving your financial stress."

On April 8, Mr. Twohy stated that the needs of his company were critical and thereafter Mr. James F. Twohy and Mr. D. W. Twohy went to St. Paul and explained that the Twohy Company was at the end of its resources and that unless the witness could find a way out for them, they would have to give up the job. After discussion, a plan for financing was agreed upon and a supplemental contract (Exhibit 19) was entered into. (This exhibit is not reproduced here because it is identical with Exhibit B attached to defendant's answer herein and admitted in plaintiff's reply.) **[212]**

H. E. Stevens' testimony (continued)

During the period from December, 1926, on, leading up to the $100,000 advance, and then to the execution of the supplemental contract and the payments thereunder, nothing was said to witness by Mr. James Twohy or by anyone else representing the Twohy Company, about the contention that the contractor was entitled to handle the log traffic under the contract. From August, 1926, to June, 1927, the subject of log haul was not put up to witness by Mr. Twohy at all and was not discussed. During this period other matters of considerable importance, involving large money payments, were discussed with the Twohy Company.

(Testimony of H. E. Stevens.)

Mr. Twohy and Mr. Boss called on the witness in St. Paul in November, 1926, and there was no doubt some statement made to the witness to the effect that the bridge contractors were in trouble; and witness probably said that they were hollering before they were hurt; but witness did not make any reference to the log haul and did not say that the bridge contractors would make money on the log haul. The question of the log haul was very much taboo since the August meeting.

Witness no doubt made the statement that he did not care to make adjustments of the contract in the course of its progress, and that no one knew how a contract would show up in its final results. This statement no doubt was made in subsequent conferences, but no suggestion was ever made by the witness that the bridge contractors might make money or recoup losses by hauling logs.

About the middle of June, 1927, after witness had made a trip over the line under construction, Mr. Twohy rode to Portland with him in witness' railroad car, and on the [213] morning of June 23, in the language of the witness, Mr. Twohy "asked me what we proposed to do about the log haul, and I told him again very flatly that we proposed to handle the logs in our own trains with our own crews."

When Mr. Twohy visited witness in St. Paul in March, 1928, at the time settlement of all claims under the contract was discussed, Mr. Twohy did not have his claims in tangible form, and witness

(Testimony of H. E. Stevens.)

asked him to make him a written statement as to what objections he had to the final (estimate), if he had any, and he did so with a letter written in St. Paul, which is defendant's Exhibit A-10. In this letter the following statement was made:

> "It has been suggested that perhaps your company felt justified in this procedure (taking over the log haul) because the amount of commercial business offered was larger than anticipated. As a matter of fact, in making our original price we did count on a substantial volume of this business. But in any event, surely any variation in the amount of business offered can not be held to vary the bargain, any more than 100 per cent increase in costly yardage quantities has been so considered."

H. E. Stevens,

Cross-Examination

Before the Railway Company took over the line from Orofino to Jaype the contractor had moved some commercial business. A few cars had been picked up and the contractor was paid $1.00 per car mile for the movement. It is not customary for the Railway Company to charge the shipper the same amount paid to the contractor for cars hauled.

Witness did not anticipate that there would be any great amount of commercial haul even including logs for the Clearwater Timber Company. That was the reason the quantity [214] was estimated for

(Testimony of H. E. Stevens.)

Item 72 in comparing the bids. Witness never contemplated moving logs for the Clearwater Timber Company in any regular operation under a construction clause. Witness expected that an occasional car might be moved and assumed that it would be negligible in its effect upon the performance of the contract.

Witness had no information as to what spurs the Clearwater Timber Company might be constructing. The hauling of logs during construction was entirely within the control of the witness and witness never contemplated moving any substantial amount of logs or any other material until the line was practically completed. Witness felt that he made this clear in his letter of invitation to bidders.

At the meeting in Mr. Stevens' car at Orofino December 18-19, 1926, the contractor was presenting claims for a special classification of sticky material and for the placing of flattened timbers in bridges. He had compilations of figures in support of his presentation. These claims had been frequently made before that time. The figures presented by the contractor purported to show that it would cost the contractor about $1.38 a yard to move the material for which special classification was claimed. At that time the witness refused to pass on these claims, asserting that they should wait until the end of the job to determine how the contractor's costs showed up and how much the job had cost the railroad. The claims for sticky material, for which special classi-

(Testimony of H. E. Stevens.)

fication was requested, had been frequently presented, and on each presentation the engineer asserted that it should be held in abeyance. The witness knew that [215] there was in fact an identifiable sticky material on the grade and the allowance for this material at $1.20 per yard was for the approximate amount which the contractor actually moved. The same was true of the allowance for placing hewed timbers in bridges.

Witness was being urged to complete the line as soon as it was physically possible to do so although no promise had been made to complete the work at any particular time. The Timber Company had talked about possible damage to logs from borers and blue stain. Damage from blue stain occurs if logs are not placed in water prior to late summer of the year in which they are cut. The Timber Company started sawing August 8, 1927. Originally the Timber Company had urged that the logs be picked up and brought to destination at once, but when the hauling began, the Timber Company was not anxious for so much haste.

Witness, between August 3, 1926, and June 23, 1927, did take up the log haul question with general counsel Lyons for the defendant company, and this was prior to the making of the supplemental contract in April, 1927, and discussed the stop-work order given in July, 1927, before it was delivered but had not discussed the letter of August 3, 1926 (Defendant's Exhibit A-2), with General Counsel

(Testimony of H. E. Stevens.)

Lyons before the letter was written. From the time of Mr. Twohy's letter of August 17, 1926 (Plaintiff's Exhibit 32), nothing more was said about the log haul until June, 1927. On June 23 Mr. Twohy brought up the question officially. In the discussions at St. Paul leading up to the making of the supplemental agreement, the log haul question was not brought up by any representative of the Twohy Company and was not discussed. [216]

Testimony of

D. F. LYONS,

a witness called on behalf of defendant.

Witness is general counsel of Northern Pacific Railway Company and has held that position since July 1, 1925, having been an attorney for the Northern Pacific Company for nearly 19 years.

Witness participated in a meeting held in Mr. Stevens' office April 25 or April 26, 1927, at the time the supplemental contract was drawn. When witness arrived Mr. Stevens told him that Twohy Brothers were in difficulties again and he began to outline the situation in a general way. Thereupon Mr. D. W. Twohy made a complete statement explaining that the Twohy Company was unable to go on with its contract in that they were in financial difficulties and could not pay their bills. He ex-

(Testimony of D. F. Lyons.)

pressed regret over this and spoke of his long acquaintanceship with Northern Pacific officials and his pleasant, cordial relations with them, and particularly with Mr. Donnelly, the president. He stated that some arrangement would have to be worked out to take care of the situation, that Mr. Stevens had been extremely fair, and that he, Mr. Twohy, was perfectly willing to leave the matter to him, being confident that the Northern Pacific would do what was right. He stated that his one request was that some way be found for keeping the Twohys on the work, that they had had a long and honorable career as contractors and that it would be disgraceful if they could not be kept on the work. Witness was then told of the suggested plan for continuing the work, and after understanding what was wanted, witness went to his office and drew up a contract.

Mr. Stevens discussed his stop-work letter with witness in July and witness approved the form of letter. Mr. [217] Stevens never at any time referred to the witness the settlement of any dispute with the contractor arising under the contract.

D. F. Lyons,

Cross-Examination

Before witness arrived to receive instructions for preparation of the supplemental contract, the parties had apparently completed their negotiations and discussions of the matters involved. Witness does not recall ever hearing about the log haul question until

(Testimony of H. M. Tremaine.)

late in June or early in July, 1927, and has nothing in his files on this subject before July, 1927. Chief Engineer Stevens counseled with him before giving the stop-work order.

Testimony of

H. M. TREMAINE,

a witness called on behalf of defendant.

The contract for the construction of the Orofino-Headquarters line was drawn by Mr. Stevens, Chief Engineer of defendant's railroad.

When log hauling commenced in July, 1927, the log pond of the Clearwater Timber Company at Lewiston was not ready to receive logs. The bulk of the pond was not covered by water, the dam had not been completed so as to permit flooding or the use of the unloading facilities. Therefore the construction spur of the contractor engaged in building the dam was used to haul the logs across the dry floor of the pond to a high water channel. When this channel became filled with logs it was necessary to dump indiscriminately on the dry ground wherever the logs could be reached by teams or derrick; at places the logs stood five or six feet higher [218] than the track. They had to be skidded or lifted out, which was a very awkward process of unloading. This situation continued until January, 1928.

(Testimony of H. M. Tremaine.)

H. M. Tremaine,

Cross-Examination

Witness is not mistaken in his statement that Mr. Stevens' letter of July 12, 1927, came to him all dated and filled out. Witness does not recall any conversation with Mr. Horan or any statement that witness had a stop-work order with instructions to hold until an appropriate time for the purpose of keeping the contractor working on the end of the line under unit prices as long as possible. Witness remembers a conversation with Mr. Horan to the effect that the stop-work order was on the way; and witness asked Horan what the mechanics of the mutual operations would be when the stop-work order was issued.

If the Twohy Company had been permitted to continue work on the first 27 miles the expense of keeping the line open for traffic would have been repaid on the contract unit price basis. The yardage in the slides would have been returned in an estimate.

The first construction tariff was published in April, 1927, effective April 12, 1927. This tariff, which is plaintiff's Exhibit 166, was filed with the Public Utilities Commissioner of Idaho, applicable to intrastate traffic, and quoted a rate of $2.95 per thousand feet on logs from Rudo, Jaype, Summit, and Headquarters, Idaho, to Lewiston and Gurney, Idaho. It was issued by "Northern Pacific Railway Company in connection with Northern Pacific Rail-

(Testimony of H. M. Tremaine.)

way Company (Construction Department)", and contained the following explanation: [219]

> "Rate named herein applies from points on newly constructed line and shipments will be accepted only subject to delay; to be moved by and at the convenience of the Construction Department until formal opening of the line, of which due notice will be given."

Witness believes that the Lewiston mill started operation August, 1927, as a kind of preliminary tryout. There was no consecutive operation after that because there were stops for adjustments. This is usual in the opening of a sawmill of any size, according to witness' observation.

Witness does not know that the logs were taken down the log pond over the protest of the Clearwater Timber Company but believes that the reverse is true. The Clearwater Timber Company was not urging the witness individually to bring logs in. Cars were turned over to the witness at Orofino with instructions from the Railway Company to take them up for loading. The actual loading was performed by the Clearwater Company. There were differences of opinion as to the rate of loading but witness believes that the Clearwater Company, after July 17, was ready to load twenty to thirty million feet of logs which were piled at Jaype or in that vicinity. There were five men on the ground at Jaype to do the loading. Witness believes this loading equipment was placed sometime in June but does not know how

(Testimony of H. M. Tremaine.)

long before July 17 the crews were there. On cars handled by Twohy Brothers for the transportation of commercial freight no rental was charged and no such charge was set up against Twohy Brothers in the rental claims presented.

There were logs along the right of way which had been cut during the clearing in the winter of 1925-1926 and the spring of 1926. The pine logs were badly damaged and [220] were not accepted by the Clearwater Timber Company but were paid for by the railroad company. Such of these logs as were salvaged were skidded up and picked up by the cherry picker. Those cut on the Clearwater lands were turned over to the Clearwater Company. Logs in the lower end generally were disposed of by witness, those that were salvaged, logs from the upper end being substituted for those belonging to the State.

When the right of way was bought from the Clearwater Company it was assumed that the timber was included. Later there was a difference of opinion about this and after discussions a payment of $10 per thousand feet was made. This was mostly white pine although there was some cedar. The yellow pine was not generally in good condition.

The Twohy Company hauled the cars in which these picked-up logs were transported. This was prior to the effective date of the first tariff. Witness thinks that this movement was not very substantial. Payment was made at the rate of $1.00 a car mile,

(Testimony of H. M. Tremaine.)

loaded and empty. Nothing was collected from the owners. The tariff rate at that time covered only the haul from Orofino west. After July 17, 1927, until the end of the year, the revenue from the commercial haul accrued to the construction department of the Northern Pacific Company.

In the late summer or fall of the year 1926, witness told Mr. James Twohy and Mr. Boss that if there was any place under the contract at which he might look for relief he might use the special classification clause because of the sticky material encountered. At some seasons of the year this material was much more expensive to handle than [221] solid rock. It was a bouldery clay, that is, a clay heavily filled or interspersed with boulders of various sizes, and contained mica. In wet seasons it was very runny and would not stay within any confines, and track could be maintained on it with difficulties, trucks would mire down, and it was altogether a slippery unsuitable material. Witness made an estimate of the amount of this material in the fall of the year 1926, and found that up to that time they had encountered 199,591 cubic yards of the sticky stuff, and the total accounted for finally was 220,000 cubic yards. The estimate was made for the purpose of assisting Mr. Twohy in presenting his claim for special classification to the chief engineer, and formed the basis for Twohy Brothers' claim of $1.38 per cubic yard. The witness probably had a

(Testimony of H. M. Tremaine.)

good many conversations with Mr. Boss about this material. At the meeting in the car of Mr. Stevens at Orofino December 18-19, 1926, Twohy Brothers presented claims to have a special price made for placing timber under water, for placing hewed timbers and for moving this sticky or gumbo material. It was at all times the opinion of the witness that the item for hewed timber had no price fixed in the contract and that a special price would have to be made to cover installation of that timber.

STATEMENT OF DEFENDANT'S EXCEPTIONS

II.

During the progress of the trial of the cause and before final submission thereof, defendant moved the Court for an order making and adopting the following, among other, findings of fact and conclusions of law: [222]

Requested Findings of Fact

"XVIII

"During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber and piles and metal fastenings described in the

complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of $1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of $1.00 per car mile."

The Court refused to make the foregoing special finding of fact and to such refusal defendant reserved an exception, which was duly allowed by the Court, said exception being in words and figures as follows:

"To the decision and order of the Court refusing to make and enter Finding of Fact No. XVIII in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"XIX

"After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

The Court refused to make the foregoing special finding of fact and to such refusal defendant reserved an exception, which was duly allowed by the Court, said exception being in words and figures as follows:

> "To the decision and order of the Court refusing to make and enter Finding of Fact No. XIX in the form duly requested by defendant [223] prior to the time of final submission of this cause to the Court."

Requested Conclusions of Law

"VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term 'team haul' as used in the contract meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track."

The Court refused to adopt or enter the foregoing conclusion of law, and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

> "To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VI in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute."

The Court refused to adopt or enter the foregoing conclusion of law; and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

"To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VII in the form duly requested by defendant prior to the time of final submission of this cause to the Court." [224]

"VIII

"Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials."

The Court refused to adopt or enter the foregoing conclusion of law, and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

"To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VIII in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

The Court, after submission of the cause and upon consideration thereof, and after the announcement of a decision therein, made and entered the following findings of fact and conclusions of law:

Findings of Fact

"XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile,	$ .02
Hauling timber furnished by the company per thousand feet b.m. mile,	.85
Hauling metal fastenings per ton mile,	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount,

leaving unpaid and due to [225] plaintiff on this item $26,843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid $5353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item $4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2563.31. The defendant has paid but $1313.62 of this amount, leaving unpaid and due the plaintiff on this item $1249.69."

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing finding of fact, which exception was allowed by the Court and was in words and figures as follows:

"To the conclusion of the Court as stated in Finding of Fact No. XIX that the stipulations of the contract between the parties fixing specified prices for hauling piles, timber, and metal fastenings were breached by defendant, and to the conclusion as stated in said finding of fact that said materials were not commercial haul to be paid for at the contract prices for hauling commercial freight."

"XX

"The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX

was not submitted to the chief engineer for decision, was not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing finding of fact, which exception was allowed by the Court and was in words and figures as follows:

"To Finding of Fact No. XX to the effect that the controversy regarding the contract price applicable to the haul of materials (piling, timber, and metal fastenings) was not submitted to the chief engineer for decision under the arbitration provision of this contract, and [226] that defendant's refusal to pay the prices claimed by plaintiff was not in pursuance to a decision under said arbitration clause, but was an arbitrary and coercive use of an assumed power."

Conclusion of Law

(Abridged—for complete conclusion see ante p. 190)

"II

Defendant breached its contract by . . . refusing to pay to plaintiff the prices fixed in

said contract for hauling materials furnished by the company and to be used in the construction of said railroad, . . . Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	$26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69

without interest prior to judgment."

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing conclusion of law, which exception was allowed by the Court, and was in words and figures as follows:

"To Conclusion of Law No. II that defendant breached its contract in the respects therein stated and that plaintiff is entitled to recover the amounts specified in said Conclusion of Law No. II."

The testimony hereinabove summarized under "Statement of Evidence—I", together with that hereinafter summarized, is the evidence necessary for a consideration of the questions of law involved in the rulings to which the foregoing exceptions were reserved: [227]

STATEMENT OF EVIDENCE—II

Testimony of

M. S. BOSS,

a witness called on behalf of plaintiff.

Witness met with chief engineer Stevens on the morning of October 15, 1925, in St. Paul and submitted the bid of Twohy Brothers. At noon of that day witness was advised that the contract had been awarded to Twohy Brothers. Thereafter in Mr. Stevens' office witness discussed with Mr. Stevens a number of price items which the latter desired changed. The bid sheet of Twohy Brothers showed Item 35 for hauling concrete pipe, and Item 36 for hauling corrugated iron pipe, as a price for team haul, while other items were for hauling with the word "team" omitted. The sheets which had come to Twohy Brothers in blank form for submitting bids and upon which these items were marked were retained by the railroad company. Twohy Brothers hauled corrugated pipe by truck, team and train and were paid the regular price of 85 cents for the train haul. Mr. Stevens suggested several changes in the prices in plaintiff's bid, and changed the words "team haul" to "hauling" in price items 35 and 36. Witness called the attention of Mr. Stevens to the fact that these were the only two items that called for team haul. Mr. Stevens said that should be overlooked and that the wording should be "hauling."

The Twohy Company, in the course of the work, hauled lots of corrugated pipe by truck, team and

(Testimony of M. S. Boss.)

train, and was paid at the regular price for hauling—85 cents a ton mile, regardless of the manner of hauling.

Bridge material was delivered in cars in the material yard at Orofino, the contractor being paid the [228] switching charges for hauling the car in, spotting it, and taking the empty out. The charge paid also includes the work of unloading. The work of sorting at Orofino was also covered by the hauling charge as well as the unloading at the material yard and the unloading at the bridge site. This work would be required whether the hauling was by rail or otherwise. Considerable sorting was required because the bridge timbers all came in mixed carloads. The foreman and two or three men on the car were required and also two or three men on the ground. The work of unloading cost about 75 cents a thousand feet. The cost of loading was about $1.50 a thousand. Unloading at the bridge site had to be done carefully because the roadbed was narrow. This work cost about $1.00 per thousand.

The Railway Company charged the contractor $1.00 a day for flat cars used in hauling bridge materials, which would be 10 cents a day per thousand feet. Cars would be in service five or six days on the average in handling carloads of material from the yards to the front and back. The contractor had to pay for the work of making and placing car stakes. Witness computes the total of these cost figures (excluding actual train transportation

(Testimony of M. S. Boss.)

cost) at $3.85 to $3.95 per thousand, whereas the Railway Company paid $1.80 per thousand.

M. S. Boss,

Cross Examination.

The change in the wording of price items 35 and 36 was made by Mr. Stevens, who drew a pencil line through the words "team haul" and wrote over them "hauling". Witness did not change plaintiff's copy to correspond. Witness [229] brought the question up because he wanted it understood that the haul might be by rail, truck, or otherwise; that is, the haul of concrete pipe and corrugated pipe was to be paid for at the specified prices no matter how it was hauled, so all hauling would be uniform. Hauling of bridge materials was in fact done with trucks, by team, and dragged by hand on sleds down the canyon slopes.

There was some corrugated iron pipe hauled in by train for which plaintiff got 85 cents per ton mile. Witness thinks 20 to 24 feet, more or less, was so hauled at station 1012, and 20 or 30 feet around station 1150, and also 24 feet at station 1231+; and some additional may have been hauled farther up. This occurred because the track was laid before the contractor was able to get the culvert pipe in. Ordinarily all culvert work would be done as the grade was built and the pipe would not be hauled in by rail. Rail haul would be far less expensive than hauling by team. Team haul of bridge

(Testimony of M. S. Boss.)

timbers would not be much more expensive than rail haul except that if the haul was for two or three miles ahead of the end of the track, it would be much more costly.

Testimony of

H. M. TREMAINE,

a witness called on behalf of plaintiff.

The total amount paid by the Railway Company for hauling bridge timbers was $38,896. Payment was made at the price specified in item 38—85 cents per thousand f.b.m. except where the bridge timbers were hauled by train. For this hauling, payment was made under item 72 of the contract—$1.00 per car mile. For the hauling of piles, the contractor was paid at the rate of 85 cents. [230]

Until January 12, 1927, the witness in making a record of movement of bridge material did not keep any record of the car numbers or amount of material in a carload, but had an agreement with Mr. C. C. Culliton, of the Pacific Utilities Company, on ar arbitrary amount of material in a car as to the material for bridges 4, 5, 8, 11, 12 and 19.

Testimony of H. M. Tremaine

on Cross Examination.

After receipt of letter from Mr. Stevens in August, 1926, stating that payment for bridge material

(Testimony of H. M. Tremaine.)

should be under item 72, witness wrote Mr. Stevens expressing doubt as to whether the dollar a car mile provided in item 72 of the contract would apply to moving these bridge materials, that there was an omission in the contract and the chief engineer should name a new price to cover it. Plaintiff requested production of this letter from Mr. Tremaine to Mr. Stevens discussing the price for haul of bridge materials and defendant declined to produce it.

Testimony of

C. C. CULLITON.

Witness was a member of the firm of Culliton & Dibblee, which had the bridge contract. He did not have any agreement with Mr. Tremaine that the cars in which bridge materials were hauled prior to January 12, 1927, should be arbitrarily considered as having contained 12,000 feet per car, and did not have any understanding with Mr. Tremaine when the bridge work started in April that the bridge materials hauled to the bridges should be arbitrarily considered as having been hauled at the rate of 12,000 feet per car, and did not have any agree- [231] ment with Mr. Tremaine that the timbers hauled by cars to bridge 1 should be arbitrarily considered as having moved at the rate of

(Testimony of H. E. Stevens.)
12,000 feet per car, and did not have any conversation with him at all on that subject.

Testimony of

H. E. STEVENS,

a witness called on behalf of defendant.

When Mr. Twohy was in St. Paul on or about August 15, 1926, for the purpose of obtaining an advance of money from the retained percentage, witness Stevens raised the question of price for hauling bridge materials, and stated that he had received a letter from Mr. Tremaine about the claim for team haul (the letter is defendant's exhibit A-65, is from Twohy Brothers to H. M. Tremaine, assistant engineer, dated August 8, 1926, and is hereinafter set out). Witness had just told Mr. Twohy witness' position on the question of log haul and then "told him with equal emphasis that I didn't propose to pay team haul prices for material that was hauled by train; that we could consider those two questions settled."

Thereafter witness received Mr. Twohy's letter of August 17, 1926 (Plaintiff's Exhibit 32), which is not here reproduced because it appears in full at an earlier place in this bill of exceptions.

The discussion with Mr. Boss regarding the words "hauling" and "team haul" occurred in the afternoon of October 15, 1925, after the contract had been let to Twohy Brothers.

(Testimony of H. E. Stevens.)

The witness M. S. Boss is in error in the statement that he made a request to have items 35 and 36 changed so as to substitute the word "hauling" for the words "team haul." [232] Witness noticed in going through the Twohy proposal preparatory to drafting the contract that items 35 and 36 were not consistent with the balance of the hauling items. The words "team haul" were used with respect to concrete pipe and corrugated pipe, but for hauling piles, timber, etc., the word "team" was not used; and inasmuch as most of the hauling is now done by trucks and tractors, the word "team" is somewhat obsolete. So instead of changing all of the items to read "team haul", witness struck out the words "team haul" in items 35 and 36 so as to make them all read uniformly "hauling." Witness has no recollection of any statement by the witness Boss or as to any discussion with him regarding the applicability of these items to any kind of haul, including haul on the newly completed railroad.

The application of price item 38—85 cents per thousand f.b.m. per mile—to timber hauled by rail a distance of 15 miles, would result in paying the contractor $12.75 per thousand feet per mile, or a total of $191.25 for moving one car over the rails 15 miles and returning the empty car. Under item 72 ($1.00 per car mile) the amount to be paid for such service would be $30.

After the meeting with Mr. Twohy in March, 1928, in St. Paul, Mr. Twohy returned to Spokane,

(Testimony of H. E. Stevens.)

and later, in May, came back to St. Paul to reopen negotiations. He was accompanied by Mr. D. W. Twohy and several conferences were held. Witness next met Mr. Twohy in Spokane June 13, 1928. At this time complaint was made about the losses sustained by the Twohy Company. The amount of these losses was stated to be about one hundred and fifty thousand dollars. The Railway Company had a very close check on their expendi- [233] tures and the amount that we paid them, and witness had very carefully gone over that prior to meeting with Mr. Twohy and his party in Spokane, and when he arrived at the car, why, his claims had shrunk to about $81,000. Witness told him that he thought he was still considerably too high, according to the check of his books made by the Railway Company auditor, and asserted that he had put in certain charges for handling gravel at the Riparia gravel pit and he had failed to credit himself with any salvage value whatever for a large amount of equipment that was left over from the job, so witness suggested that the equipment should be put in at about a scrap value of say $21,000, or thereabouts, and when with all of these deductions his figure showed about $35,000. Witness then said, "I think that is still nearly twice too high." Witness' figures at that time showed a loss between fifteen and twenty thousand, the exact figure witness believes being about $19,000. The matter was discussed, pro and con, and witness finally said, "In order to settle

(Testimony of H. E. Stevens.)

all dispute as to who is right, as to how much you have lost, if any, I will pay you $60,000 flat, and I will waive the bills that we have against you under the terms of the contract for rental of equipment, amounting to about $22,000. I don't care where or how you allocate it, what you call it; I call it just one thing, and that is a final settlement on the Orofino job. I will pay that, and we will sign off and call it a day." And Mr. Twohy and Mr. Horan thought that over for a while and advised witness that they didn't think they could accept it. [234]

H. E. Stevens,

Cross Examination.

Witness considered item 72 would cover train haul of bridge material as distinguished from team haul, which would be covered by item 38. This had been applied to the haul of coast timber.

Witness did not anticipate that coast timber would be used if other material was found that could be used to better advantage, except for the decks of the bridges and except for Whiskey Creek Bridge, which was the largest bridge.

Before the Northern Pacific took over the line between Jaype and Orofino, the contractor had moved a few cars for different loggers and was paid $1.00 a car mile by the Northern Pacific, but the Railway Company did not charge the shipper what it had paid the contractor; this was not customary since the railroad company could only

(Testimony of H. E. Stevens.)

charge the shipper whatever was provided by tariff.

Witness did not anticipate there would be any great amount of commercial business under item 72, even including logs for the Clearwater Timber Company, and therefore did not put in any quantity in his estimate under item 72 because in the first place there was no way of estimating it, and in the second place, witness never contemplated moving the logs for the Clearwater Timber in a regular operation under a construction clause.

Witness' estimate on the amount of coast timber covered by team haul was 30,847 thousand feet. Witness considered it debatable whether there would be team haul or not on some of these items, but anticipated there would be some rail haul by the contractor on coast timber for use in the bridges [235] and that this would be paid for under item 72. No quantities were set up or extended in the estimate for this because there was no means of ascertaining where the material yards would be located. It would be a guess at best and would not amount to any very considerable sum. Witness did, however, make an estimate of the average amount of team haul anticipated under item 38.

Witness changed items 35 and 36 from "team haul" to "hauling" in order to have the different items consistent, but did not make corresponding changes in the specifications. The term "hauling" and the term "team haul" are used rather interchangeably through the specifications.

Testimony of

H. M. TREMAINE,

a witness called on behalf of defendant.

DEFENDANT'S EXHIBIT A-65

is a letter received by witness from Twohy Brothers Company, dated August 8, 1926, reading as follows:

"Orofino, Idaho,
August 8th, 1926.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway,
Orofino, Idaho.

Dear Sir:

In checking over July estimates we note that we have not been paid for the hauling of timber, metal fastenings and galvanized iron to Whiskey Creek, Bridge #1.

You have estimated 462,000 FBM of timber which you should pay haul on at 85¢ per M FBM, also on the iron used in this bridge at 65¢ per ton mile and 1950 lbs. of galvanized iron at 65¢ per ton mile.

Will you please arrange to have this allowed in August estimate.

Yours truly,
TWOHY BROTHERS COMPANY
By M. S. Boss." [236]

DEFENDANT'S EXHIBIT A-66

is a letter written by witness to Twohy Brothers Company dated August 9, 1926. reading as follows:

(Testimony of H. M. Tremaine.)

"Orofino, August 9th,
1926.

Twohy Brothers Company,
Orofino, Idaho.

Gentlemen:

Acknowledging receipt of your of August 8th relative to payment for hauling of bridge material from the material yard to the site of erection.

I have referred this question to Mr. Stevens for his ruling and will advise you promptly on its receipt.

Yours very truly,
H. M. TREMAINE,
Assistant Engineer."

DEFENDANT'S EXHIBIT A-67

is a letter written by Chief Engineer Stevens to witness, dated August 21, 1926, with notation that copy has been sent to Twohy Brothers Company, reading as follows:

"St. Paul, Minn.
August 21st, 1926.

Mr. H. M. Tremaine,
Assistant Engineer,
Orofino, Idaho.

Dear Sir:

Your letter of August 9th with copy of letter from Mr. Boss requesting payment on basis of team haul for material used in the Whiskey Creek Bridge.

Mr. James Twohy called on me last week and I advised him that we would be glad to pay

(Testimony of H. M. Tremaine.)

team haul for such material as was actually hauled by team and that for material hauled by train we would pay train haul as covered by item 72 of contract. You will further note there is a 4 mile limitation on the team haul item.

I think it was thoroughly understood, [237] both by the contractors and ourselves, how these clauses of the contract were to be interpreted and see no reason for raising the question at this time.

(Signed) H. E. STEVENS,
Chief Engineer."

H. M. Tremaine,

Cross-Examination.

Witness' material clerk did not keep the numbers of cars which transported timbers for bridge No. 1 but witness was not advised of this. Beginning January 12, 1927, directions were given that car numbers and exact dates be kept. The failure to keep the car numbers was not due to any interpretation that the Railway Company was to pay 85 cents per thousand feet per mile, regardless of the manner of hauling. Witness did not write to Mr. Stevens that the 85-cent price should be paid but told Mr. Stevens there was some doubt in his mind as to whether the item of $1.00 a car mile in the contract specified by schedule 72, would cover this train haul, stating that he believed Mr. Stevens should name a new price, there being evidently an omission from

the contract. This was after the receipt of Mr. Stevens' letter stating that he had advised Mr. Twohy that the railroad would pay the $1.00 per car mile rate.

LOCAL RULES GOVERNING BILLS OF EXCEPTION

Following are the rules of the District Court of the United States for the District of Oregon now in effect governing the preparation and allowance of bills of exception: [238]

Rule 41

"When an exception is taken, as provided in Rule 40, within ten days after judgment the party taking the same must prepare, in due form, a bill of exceptions, and deliver it to the clerk, for the judge, and serve a copy thereof on the attorney of the adverse party, who may, within five days thereafter, in like manner deliver and serve amendments thereto, and within five days thereafter the party taking the exception may serve a notice upon the attorney of the adverse party, to the effect that he objects to the amendments, and will, at a time not less than three nor more than five days thereafter, apply to the judge at his chambers to settle and sign the bill of exceptions.

If a bill of exceptions is not delivered and served in due time, the exceptions will be

deemed abandoned; and if an amendment thereto is not delivered and served in due time, the bill of exceptions will be deemed assented to; and if such an amendment is delivered and served and no notice of objection thereto is thereafter duly served by the party taking the exceptions, the same will be deemed assented to by said party."

Rule 42

"A proposed bill of exceptions, and the amendments thereto, if any, are to be considered and submitted to the judge for examination and allowance, without any further notice or action by either party, whenever, according to Rule 41, such bill, or bill and amendment, is to be taken as assented to by the adverse party; and when the same is found or made to conform to the facts it will be allowed and signed by the judge and directed to be filed."

CERTIFICATE OF SETTLEMENT AND ALLOWANCE

I, the undersigned, United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions is a true and correct record of exceptions reserved by defendant upon the trial of the cause, and of all material facts, matters, proceedings, and rulings occurring upon the trial of [239] the cause

and not heretofore a part of the record herein, pertaining to and necessary for an understanding and for consideration of the questions of law involved in each of the rulings to which such exceptions were reserved.

I further certify that the foregoing bill of exceptions contains all of the evidence adduced at the trial of the cause and all of the exhibits offered in evidence upon the trial, pertaining to and necessary for an understanding and for consideration of the questions of law involved in each of the rulings to which such exceptions were reserved.

I further certify that the foregoing bill of exceptions contains all local rules relating to the presenting, settling, and filing bills of exceptions, and to extensions of terms for such purposes, and also all orders made by me extending the time for presenting, settling, and filing of bills of exceptions herein.

I further certify that the foregoing bill of exceptions was duly presented to me for allowance and settlement on the 7th day of May, 1937, and within the time prescribed for that purpose, and during the term, as extended, in which judgment was entered in this cause; and I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this cause and direct the same to be filed as a part of the record herein.

Dated this 19th day of May, 1937.

JAMES ALGER FEE

[Endorsed]: Filed May 19, 1937. [240]

And Afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, Plaintiff's Bill of Exceptions, in words and figures as follows, to wit: [241]

[Title of Court and Cause.]

PLAINTIFF'S BILL OF EXCEPTIONS

Be It Remembered, after the issues in the above entitled cause were made up, the court on September 17, 1929, passed an order referring said cause to Everett A. Johnson, an attorney at law, of Portland, Oregon, as auditor and special master, to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties, and make and file a report in the office of the clerk of this court respecting the facts in the case, with a view to simplifying the issues for the court and jury, but not to finally determine any of the issues of fact in the action, the final determination of all issues of fact to be made by the jury on the trial, or by the court, if a jury is waived.

Thereafter witnesses were called before said auditor, their testimony taken, and the notes of such testimony transcribed, and the auditor in due course filed with this court his report.

Thereafter there was filed in this court and cause a stipulation waiving trial by jury, in the following language (omitting title of cause and signatures of attorneys):

"It is stipulated between the plaintiff and defendant that the above entitled cause may be tried and determined by the court, without the intervention of a jury, the parties hereby agreeing to waive a jury." [242]

Thereafter there was filed in this court and cause a stipulation in the following terms (omitting title of cause and signatures of attorneys):

"It is stipulated that at the trial of the above cause the testimony of any witness given before the auditor may be read by either party from the transcript thereof, whether or not said witness is personally present in court, and whether or not such witness testifies in person at the trial. When so read such testimony shall be considered as testimony offered at the trial by the party who called such witness to testify before the auditor. If any part of the testimony of any witness given before the auditor is offered at the trial, all of the testimony given by such witness before the auditor shall be considered as included in the offer. All objections to testimony made during the hearing before the auditor shall be considered and ruled upon by the court, and exceptions to the court's ruling will be considered as having been taken. No other objections to testimony shall be offered."

Thereafter said cause came on to be heard before the court, without a jury, and the parties respectively called each witness called by such party

(Testimony of H. M. Tremaine.)

before the auditor, and offered the testimony as given before the auditor, including all documentary evidence, which disclosed the following:

MR. H. M. TREMAINE,

called as a witness by plaintiff, testified that he was the resident engineer in charge of constructing the Orofino branch railroad; that the contract for the construction of said road was drawn by Mr. H. E. Stevens, chief engineer of the Northern Pacific Railway Company. Witness identified the original of said contract, which was offered in evidence, and is the contract set up as Exhibit "A" to the answer of defendant. Said contract was signed by plaintiff November 18, 1925, and contains the following provisions:

> "The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made [243] part of this contract, the clearing, grubbing, grading, culverts, bridging, tunnels, track-laying and ballasting and all other work for which prices are hereinafter named on the branch line of the

(Testimony of H. M. Tremaine.)

Railway Company extending from Oro Fino to Headquarters in the state of Idaho."

"Preliminary estimated quantities and classification, if shown on the profile, or furnished the Contractor, are approximate only and will in no way govern the final estimate. The Company reserves the right to increase or diminish the approximate estimated quantities without affecting the contract unit prices for the various parts of the work except as provided in the contract."

MR. JAMES F. TWOHY

was called as a witness by plaintiff and testified that he is the secretary of plaintiff company; that the invitation to bid upon the Orofino railroad construction was submitted to plaintiff by Mr. H. E. Evans, chief engineer of the Northern Pacific Railway Company, by mail. Thereupon witness identified a letter dated September 18, 1925, from Mr. Stevens, chief engineer, to plaintiff, which was offered in evidence. To this offer plaintiff offered the following objection:

"The defendant objects to the admission of the proposed document, which appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is imma-

(Testimony of Mr. James F. Twohy.)

terial and not competent in support of any issue in this case."

Said letter was marked as

PLAINTIFF'S EXHIBIT 21,

and is in words and figures as follows:

"Northern Pacific Railway Company
Engineering Department
St. Paul, Minn. Sept. 18, 1925.

Twohy Bros.,
1818 L. C. Smith Bldg.,
Seattle, Wash.

Gentlemen:

I am sending you under separate cover the following data: [244]

1—Print of sectional map showing in red location of proposed branch line railway from Oro Fino to Headquarters, Idaho; Oro Fino being a point on the Clearwater Branch 29 miles west of the junction of the Clearwater Branch with the Palouse & Lewiston Branch at Arrow.

2—Profile of proposed line in three sections: M. P. 0 to 15, M. P. 15 to 28, and M. P. 29 to 41.

3—400′ to the inch scale map of the located line.

4—General description of the line taken from notes of Locating Engineer Chamberlin.

5—Complete set of construction specifications, including proposal blank.

6—Extra proposal blank for bidders record.

(Testimony of Mr. James F. Twohy.)

If you care to submit a proposition for the construction of this branch, please have your bid in my office on or before October 12.

You will note we have specified that work be commenced immediately on award of contract, and that bridging, grading and track laying be completed on or before June 1, 1927. Balance of work to be completed on or before September 1, 1927. This line is to be constructed for the purpose of handling logs and forest products from the Clearwater timber belt to the large mills to be constructed at Lewiston, in connection with the power development work now under way at that point.

The Clearwater Timber Company except to have their new mill at Lewiston ready for operation in the early part of 1927, and as this will represent a very large investment it is important that the railway be in position to deliver logs to the mill on its completion. We have therefore specified that the track laying shall be completed not later than June 1. This will put us in position to start delivery of logs and a little additional time can be allowed for the finishing, ballasting and completion of the railway.

For 26 miles out of Oro Fino this line lies in the steep and narrow canyon of Oro Fino Creek. At many points the line is inaccessible from either side of the creek, and equipment

(Testimony of Mr. James F. Twohy.)

and supplies will have to be handled along the canyon bottom.

It seems to me, therefore, the best opportunity of entering the canyon with equipment and supplies will be during the coming winter. Generally the snow in the lower slopes of the Clearwater is not excessive, and unless we get unusually severe weather conditions the equipment and supplies can be toted through the canyons on the snow; camps established, much of the clearing done, and everything lined up ready for starting the major construction promptly on the opening of spring. A good deal of the rock work through the canyon can perhaps be handled to best advantage by station men and a very fair start on the station work could be made during the winter months. In any event, it seems to me quite important that we get in the equipment, and camps established along the canyon, during the winter, as the roads in the spring are generally in very poor condition. [245]

From the upper end of the canyon to Headquarters the line will probably be inaccessible during the winter account of excessive snow.

You will note the bridging will be unusually heavy, there being 50 crossings of Oro Fino Creek in the 26 miles between Oro Fino and the head of the canyon. We have not yet reached final decision as to type of bridges and

(Testimony of Mr. James F. Twohy.)

method of construction, but at this time it seems quite probable that we will find it expedient and economical to construct a part of the bridges in temporary form in order to expedite the track laying. This temporay construction will be later replaced by long timber spans or second hand girders resting on timber bents supported on concrete pedestals or light concrete piers. Many of the crossings are on a very sharp angle with the Creek and in all probability crib construction in such cases would block such a large part of the channel that we will find it necessary to construct concrete supports.

Engineer Chamberlin suggests the possibility of installation of small portable saw mills for manufacturing bridge materials, etc. It is somewhat questionable if this can be done economically. However, it is a possibility which will be given consideration.

The town of Pierce, at the head of Oro Fino canyon, is an old placer mining camp, and the Creek at that point has been the scene of extensive placer operations. Material is a course gravel and it may be possible to obtain concrete and perhaps ballast material from this location, but our information at this time is not sufficient to enable us to state positively that this can be done. It however offers a possibility.

Our engineering parties, in charge of Mr. Sidney Jones, are now engaged in retracing the located center line. This work having been

(Testimony of Mr. James F. Twohy.)

completed through the canyon. You will note from the map that the balance of the line can be easily inspected from the highway, from Pierce to Headquarters, which is now in very fair condition for automobile travel.

Yours truly,

HES-ar H. E. STEVENS"

Witness identified the profile referred to in said plaintiff's Exhibit 21, and testified that it under separate cover accompanied said letter of invitation. Whereupon said profiles were offered in evidence. To this offer the same objection was offered by defendant as was made to Exhibit 21, which objection is hereinabove quoted. Said profile was marked in three separate sections, the first 15 miles out of Orofino was marked plaintiff's Exhibit 22, from Mile 15 to Mile 28 was [246] marked plaintiff's Exhibit 23, and from Mile 28 to Mile 41 was marked plaintiff's Exhibit 24.

Witness then identified a document headed "Northern Pacific Railway Company, Orofino Branch, Clearwater County, Idaho, Description of Line", as a document that came with the profiles from defendant to plaintiff. The document was offered in evidence. Defendant made the same objection to this offer as was made to Exhibit 21 above quoted, and with the additional reason stated that "It is an attempt to vary the terms of the written contract thereafter made." Said document was marked plaintiff's Exhibit 25.

(Testimony of Mr. James F. Twohy.)

Witness further testified that the invitation to bid was accompanied by blank forms in duplicate upon which the bid prices for the various units of work were to be entered. Witness testified that the bid was made up by Mr. M. S. Boss, superintendent of Twohy Brothers Company, and that witness assisted in studying the figures made up by Mr. Boss.

MR. H. E. STEVENS

was called as a witness in behalf of defendant. Witness stated that he was chief engineer of Northern Pacific Railway Company during the period of constructing the Orofino branch and was at the time of the hearing Vice-President of said company; that the project of building a railroad from Orofino into the Clearwater Timber Company's timber holdings was a very old one with the Northern Pacific, which in 1909 put a preliminary survey for about 20 miles up Orofino creek; that from 1916 to 1925 there were intermittent negotiations between the railway company and the Clearwater Timber Company looking to the building of a railway out of Orofino; that in 1921 the timber Company put in an engineer, Mr. Chamberlin, who made a survey for a line which the timber company contemplated building. Thereafter Mr. Chamberlin and officers of the timber company met with officials of the Union Pacific Railway Company and the Northern [247] Pacific Railway Company in St.

(Testimony of H. E. Stevens)

Paul to discuss the possibility of constructing the railroad desired by the timber company. Conferences continued until the year 1925, early in which year the timber company suggested the possibility of working out a plan whereby it would assume part of the carrying charges on the proposed line. In early June of that year the railway company agreed that it would go ahead and build a railroad to the Clearwater Timber Company's holdings, a point in the vicinity of Headquarters. Whereupon the railway company ran surveys up other streams, and after these surveys were made there were further conferences resulting in the timber company concluding that the line ought to go up Orofino creek, where the Chamberlin survey had laid it. At that time witness had no data up Orofino Creek, other than the Chamberlin profile. The timber company was anxious to go ahead with the project for their mill at Lewiston, and witness was asked to get the line started immediately. Witness then stated, "That naturally forced the taking of bids on the Chamberlin profile."

Witness then sent out invitations to bidders with the letter of September 18, 1925. Witness sent other information to the bidders in addition to the letter of September 18, which is in evidence as Exhibit 21. He sent them a supplemental letter on October 5, 1925, sending plans and specifications for tunnels, and an additional letter on October 7 or 8 to correct an error in the proposal blank. The letter of October 5 was identified by witness and

(Testimony of H. E. Stevens)
offered in evidence by defendant and received without objection as defendant's Exhibit A-4, and the letter of October 7 or 8 was offered by defendant and received in evidence without objection as defendant's Exhibit A-5.

Evidence was offered tending to show that in accordance with the statement in said invitation (Exhibit 21), defendant transmitted and plaintiff received the data referred to in said letter of invitation as having been compiled in connection with the so-called [248] Chamberlin survey, consisting of a profile of location and computation of estimated yardage of material to be moved in constructing said proposed railway line, the number of bridges to be constructed and a mile by mile description of the line indicated on the profile. This description indicated the classes of material that would be encountered on the line surveyed by Chamberlin, warned that at certain locations on the line, as indicated by the Chamberlin survey, material was soft and would break back or slide, and that numerous crossings of Orofino Creek by bridge, as well as crossings of other minor confluent streams, would be necessary to avoid trouble from slides and break backs. Said report showed the line commenced at Orofino, ascending 2,574 feet from Orofino to the summit of the range of mountains intervening between Orofino and Headquarters, and then descending 449 feet from the summit to Headquarters. The length of the main line of road was 41 miles, as indicated on said report. It indicated

(Testimony of H. E. Stevens)

that the first crossing bridge would be required at the crossing of Whisky Creek at mile post 3.5 out of Orofino; that the first crossing of Orofino Creek would be at mile 5.8 out of Orofino; that between mile post 5.8 and mile post 10 out of Orofino there were 5 channel changes of stream to be made and four river crossings; that between mile post 10 and mile post 14 out of Orofino there were 11 river crossings and 2 channel changes, the line having entered the lower canyon of Orofino Creek at mile post 10. The Chamberlin report further stated with respect to the projected line between mile post 15 and mile post 20 out of Orofino:

> "At mile 15 the line begins to make ascent on 2.2% compensated grade to a point just below the Old American Mine at Mile 20. From here up the walls of bare basalt rock get higher, the point bolder, oxbow heads heavier and more frequent, until, while using all curvature possible [249] it becomes a case of hit a point and cross, then hit and cross again; holding the grade line 20 to 50 feet above the water in order to get through at all. To hit the walls hard in an effort to eliminate bridges would in many cases create a mass of waste material that would fill the canyon.
>
> At Mile 16 on the upper side of Bennett Canyon is the first tunnel, which is 100 feet long through a high rib of basalt, around which the creek makes a long crooked detour.

(Testimony of H. E. Stevens)

Mile 18 Rainy Creek

Mile 18.7 Cow Creek

On Mile 19 there are two falls in the river. Where the line crosses just above the upper falls the rock walls are only about 60 feet apart. On the six miles from Mile 14 to 20 are 25 crossings of Orofino Creek, being half the total crossings on the line. All material is solid and slide basalt rock. River bottom heavy gravel, rock and boulders. Tote road will hold high up on north side."

The report indicated 50 crossings of Orofino Creek, 11 crossings over Quartz Creek, and other bridges over gulches and tributary drainage, bring the aggregate number of bridges to 71.

The evidence further tended to show that Engineer J. A. Chamberlin had not made his location survey, profile and estimates as an employee of defendant; that said engineer was an employee of the Clearwater Timber Company for whom he made said survey and report; that the projected railroad was being constructed by defendant as a result of negotiations between it and Clearwater Timber Company to move logs of the timber company which undertook a part of the carrying charges of the cost of constructing the railroad.

The evidence further tended to show that the railroad location, as made by Engineer Chamberlin, had all of the essentials of a final location, with grade, curvature and yardage given. It indicated a total yardage to be moved of 1,078,000 cubic yards,

(Testimony of H. E. Stevens)
of which 708,000 cubic yards was solid rock, 144,875 cubic yards was loose rock, and 225,220 cubic yards was common earth. The evidence further tended to show [250] that plaintiff in constructing said railroad actually moved a total of 2,057,575 cubic yards of material, of which 1,164,987 cubic yards was solid rock, 473,965 cubic yards was loose rock, 149,078 cubic yards was hardpan, 224,251 cubic yards was a spongy conglomerate (for which extra unit compensation was awarded) and 43,853 cubic yards was common earth.

The evidence further tended to show that after plaintiff began work on said railroad many of the crossings of Orofino Creek by bridge were eliminated by defendant and embankments substituted therefor, in many instances requiring the making of new channels for Orofino Creek, and laying the railroad in the old creek channel.

There was evidence tending to show that plaintiff made its bid upon the amount and character of work indicated on the estimate made by Engineer Chamberlin; that the several bids were computed and totaled by defndant's chief engineer on the basis of the said Chamberlin survey and estimate; that field engineers of defendant cross-sectioned the Chamberlin survey in the field and started the construction work in accordance with this cross-section; that plaintiff sublet all of the work, plaintiff maintaining complete supervision thereof; that each subcontract was submitted to and approved by the defendant's chief engineer, and that numer-

(Testimony of H. E. Stevens)

ous copies of the said Chamberlin profile and report provided by defendant were used in subcontracting the work.

There was evidence tending to show that the Chamberlin profile showed limited solid rock between the town of Orofino and the entrance to the canyon of Orofino Creek, with much solid rock work in said canyon and much bridging, and approximately 24 changes of the channel of Orofino Creek; that in the construction of said railroad there were 24 new [251] and additional changes of channel of Orofino creek not indicated on the said Chamberlin profile; that above said canyon the solid rock work was again limited in quantity; that the first 15 miles from the town of Orofino was sublet to one contractor, Rumsey & Jordan; that the work through the canyon of Orofino creek was sublet in comparatively small stretches to a number of subcontractors, and the work from the upper end of Orofino canyon to Headquarters was let to one contractor.

Under the order of reference to the auditor the latter had no authority to pass upon the admissibility of evidence or to rule upon objections, but merely noted the objections when made. Under the stipulation hereinabove quoted for submitting the case to the court upon the testimony taken before the auditor the objections made to testimony offered before the auditor were continued before the court. The court did not rule upon the admissibility of the evidence to which objection was

(Testimony of H. E. Stevens)
offered as hereinabove noted, nor upon the objections thereto, until the time of rendering his oral opinion, when the court limited the foregoing evidence in connection with the contract to establishing the general course of the projected road to be from the town of Orofino to Headquarters, through the canyon of Orofino creek, and rejected said evidence as representations of the line and grade of said railroad or the amount and character of work to be performed under the contract. To this ruling plaintiff duly excepted, which exception was in the following language:

> "Plaintiff excepts to the rejection of evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor."

and which exception was duly allowed by the court. [252]

Plaintiff requested the court to make the following finding, being request number I, which request the court refused:

> "The due making of the contract involved in this case is conceded by both parties, and a copy of such contract is attached to the answer of the defendant. The contract was entered into as a result of an invitation by the defendant to the plaintiff to bid on the construction of a line of railroad from Orofino to Headquarters in the State of Idaho, which was and

is a distance of approximately forty-one (41) miles. The invitation given by the defendant was accompanied by representations that such line of railroad would be located and constructed in accordance with a profile thereof prepared by a certain locating engineer by the name of Chamberlin. The profile mentioned represented and stated the line of railroad with its degrees of curvature, its grade and all usual information connected with a definite location of a line of railroad, including a statement of the amount of material to be moved, the number of bridges to be constructed, the number of channel changes of Orofino Creek to be made, the number of tunnels to be bored, and a full and complete description of all the work to be done. The invitation to the plaintiff from the defendant further represented that any bridges built would be with a foundation of rock filled cribs or concrete pedestals supported by cribs." [253]

To the refusal to make said finding, plaintiff duly reserved the following exception:

> "Plaintiff excepts to the refusal of the court to find that said Chamberlin survey and estimates were a representation by defendant as in requested finding number I."

which exception was duly allowed by the court.

Plaintiff requested the court to make the following finding, being request number IV, which request the court refused:

"The line of railroad provided to be constructed under the contract mentioned and found was through a rough piece of country beginning at the entrance of a narrow canyon of Orofino Creek which has high and steep banks. The time elapsing between the date of the invitation from defendant to plaintiff to bid for the doing of the work and the date upon which the bid of plaintiff for same was required to be made and was made was in fact insufficient for the plaintiff to make a full and complete survey and examination of the proposed work, and the problems and obstacles which might be encountered in the performance of same. Plaintiff did make such examination as the time permitted, but by reason of the shortness of time for such examination was compelled to and did rely in the main as to the work to be done upon the representations by defendant as to the nature and character and amount of work to be done and the location of same."

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal to give *and* other modification of plaintiff's requested instruction number IV and particularly to the refusal to find that plaintiff was compelled to and did rely upon representations made in the preliminary invitations to bid as to the character and amount of work to be done."

which exception was duly allowed by the court.

Plaintiff requested the court to make the following finding, being request number VI, which request the court refused:

> "The defendant informed plaintiff to base its bid on the requirement that the performance of the contract would require the construction of seventy-one (71) bridges of which approximately fifty (50) would be in the narrow canyon of Orofino Creek so placed as to permit the construction of a line of railroad to avoid the necessity of cutting off the steep points of land in the sides of the canyon to any extent greater than an absolute minimum. The [254] engineer, Chamberlin, had advised defendant, and such information and advice was communicated to plaintiff, that cutting off too much of said points would be unwise and would result in a very large quantity of waste material. Also, plaintiff was informed and advised to base its bid on the requirement of construction or making of approximately twenty-four (24) channel changes in Orofino Creek, which changes were in comparatively flat territory and of small import and not difficult to construct. No special price was provided in the contract for these channel changes."

To the refusal to make said finding, plaintiff reserved the following exception:

> "Plaintiff excepts to the refusal of the court to make plaintiff's requested finding number VI or something equivalent thereto as necessary to an understanding of the work contracted for and actually required to be done."

which exception was duly allowed by the court.

Plaintiff requested the court to make the following conclusion of law, being request number I with respect to conclusions of law, which request the court refused:

> "The contract between plaintiff and defendant was to construct a railroad between Orofino and Headquarters in the State of Idaho substantially in accordance with the profile and representations upon which plaintiff bid, subject to incidental adjustments as work progressed."

To the refusal to make said conclusion of law, plaintiff reserved an exception, which exception was duly allowed by the court.

The court made the following finding of fact, being number VI:

> "At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer's estimate of quantities of material to be re-

moved, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad." [255]

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding of the court number VI in so far as said finding holds that the maps, profiles and engineer's estimates submitted with invitations to bid did not represent the amount or extent of construction work to be done and the general location of the work."

which exception was duly allowed by the court.

The court made the following finding of fact, being number VII:

"In the construction of the railroad there were two instances in which a change of line was directed by defendant. This resulted in leaving the route originally surveyed and constructing the line upon a different location. There were many other instances in which the line was not constructed exactly as indicated by the location survey, and the number of bridges built and the number of channel changes made differed from those indicated by the preliminary data supplied to bidders. But the work actually done by defendant was

the work contracted for and was not a change of the line and grade of railroad contracted to be built, or of the work embraced in the contract."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding number VII in so far as said finding holds that the maps, profiles and estimates submitted with the invitation to bid did not constitute a representation as to amount, quantity and location of work that became a misrepresentation when the work actually required was in excess thereof and departed therefrom."

which exception was duly allowed by the court.

The court made the following finding of fact, being number VIII:

"Plaintiff in the performance of the contract handled a much greater amount of yardage than that shown by the estimates made by the locating engineer and shown on the preliminary data supplied to plaintiff and other prospective bidders prior to the making of the contract. But the yardage so handled by plaintiff was the work which it contracted to do at the unit prices applicable and was not additional work resulting from any change in the line or grade of railroad or the amount of work embraced in the contract." [256]

To the making of said finding of fact, plaintiff reserved the following exception:

> "Plaintiff excepts to finding number VIII in so far as said finding holds that the increased yardage and other work which plaintiff was required to do over and above that represented in the preliminary profiles, maps and estimates submitted with invitations to bid was the work which it contracted to do and was not additional work or a change in the amount of work embraced in the contract."

which exception was duly allowed by the court.

There was further evidence tending to prove that the contract between plaintiff and defendant was in words and figures as in the document attached to the answer of defendant as Exhibit "A"; that said contract was prepared by defendant; that it was discussed between the parties at St. Paul, Minnesota, about October 15, 1925; that about said date plaintiff was advised that the contract would be given to plaintiff and plaintiff immediately began assembling men and equipment, was on the job in Idaho within a few days thereafter and a week before the defendant's resident engineer arrived on the scene; that before submitting its bid plaintiff ascertained that subcontractors and machinery were available, and discussed the work in detail with the defendant's chief engineer at the time and immediately after plaintiff submitted its bid, and that plaintiff likewise adopted and submitted to said chief engineer a definite plan for accomplishing

the work within the time stipulated in the contract; that said plan involved the immediate beginning of work, and that said plan was approved by said chief engineer; that plaintiff was adequately equipped and manned for the work outlined in the data submitted with the invitation to bid. [257]

There was also evidence tending to prove that defendant did not have trackage arrangements made to Orofino to handle plaintiff's equipment, and that plaintiff had to construct this trackage after it got its equipment on the ground; that defendant had made no arrangements for camps for its station engineers on the job, of which there was one engineer for each subcontractor, and plaintiff had to construct said camps; that defendant had failed to acquire rights of way for its projected road on the lower end, and plaintiff was compelled to shift its crew of workmen from one point to another because intervening rights of way had not been acquired by defendant, at a considerable loss of time; that a bridge program was not developed until late, and plans for bridges were delivered to plaintiff piecemeal through the summer of the year 1926; that defendant did not advise its bridge engineer of a large overrun of yardage on the lower end of the projected line, nor of the proposed elimination of many bridges, and that the preparation of plans for bridges actually constructed was delayed thereby; that defendant's arrangements with the Clearwater Timber Company for right of way through the latter's premises required defendant to preserve for the Clearwater Timber Company

the logs cut from the right of way; that between September 1926 and April 1927 extreme winter conditions prevailed in the mountains through which the road was projected; Orofino Creek was filled with ice, and subjected to freshets of unusual proportions, which threatened to carry away the said Clearwater logs; these hazards came frequently, and on those occasions defendant directed plaintiff to put all plaintiff's men (bridge crews, construction men, tracklaying crews) to work protecting the line against damage from log jams caused by these Clearwater logs banked within the reach [258] of the floods; that these demands caused frequent interruption of plaintiff's work, and consumed 17,000 man hours of time.

There was evidence tending to prove that the lower end of the contracted line (that heading out of the town of Orofino) was of strategic importance in controlling movement of freight and materials for use in the construction of the projected line of railroad in and beyond the canyon of Orofino Creek; that the schedule of work under plaintiff's plan approved by defendant's chief engineer called for this strategic section of construction (sublet to Rumsey & Jordan) to be completed by July 15, 1926; that the Chamberlin profile and survey of this sector represented that 352,425 cubic yards of material would be required to be moved in constructing it; that upon this profile the subcontract was let and plaintiff's plan of work developed; that when the work on this sector was completed

Rumsey & Jordan had moved 635,842 cubic yards of material.

There was further evidence tending to prove increases in yardage over that represented upon the Chamberlin survey throughout the entire line of railroad; that the increase was gradual, and information of changes that would increase yardage was given to plaintiff piecemeal; that the resident engineer of defendant failed to furnish plaintiff with the revised estimates of total yardage to be moved; that as early as March 1926 the resident engineer became convinced there would be a considerable overrun in yardage, but did not advise plaintiff thereof; that on the first 15 miles contracted to Rumsey & Jordan plaintiff had moved 355,000 cubic yards of material by June 30, 1926; 410,000 cubic yards by July 31, 1926; and 480,000 cubic yards by Augst 1, 1926. [259]

There was further evidence tending to prove that in the course of the wok defendant made many changes from the work indicated on the Chamberlin survey furnished to plaintiff; that a tunnel was changed to an open cut at a great increase in work; that at one location the line was shifted back and forth delaying the work several months; that a cut was widened piecemeal, with workmen hanging by ropes to reduce the slopes; that the line was shifted from one side of Orofino Creek to the other, requiring plaintiff to move heavy machinery and prepare for different haul of waste; that at mile 28 the entire job was changed from team work to heavy rock work, after teams and supplies were

on the job; that the route and grade of the line were completely changed above Orofino Canyon, compelling the contractor to shut down and haul supplies in winter over difficult roads; that several years after the line was completed inspection on the ground disclosed line changes, abandoned cuts, evidences of shifting the line back and forth; that a road grade 100 feet wide was developed in some places, which plaintiff claimed was due to indecision of the resident engineer, resulting in shifting the line back and forth; that the Engineer Chamberlin in his report on the projected line warned against cutting deeply into the rocky points of Orofino Canyon because of the slides that would be caused thereby; that the canyon is one of the roughest known to the experienced engineers who testified; that defendant by eliminating bridges and substituting channel changes and embankments therefor cut deeply into many rocky points, sometimes cutting into the hill as much as 55 feet, resulting in mud slides and break backs that plaintiff had to move; that a slight change of center line of grade, as much as 1 foot, in precipitous rocky points, could increase the yardage at that place 1000 per cent. [260]

There was further evidence tending to prove that in eliminating bridges indicated on the Chamberlin survey defendant required plaintiff to make approximately 22 changes of the channel of Orofino Creek, in addition to those indicated on the said survey; that this was accomplished by cutting a new channel out of the abutting mountain and filling in the

old creek channel for road bed; that some of these new channels were cut to a depth as great as 70 feet, that required plaintiff to elevate the rock and earth in removal, and forced men to work in water; that some of these channel changes were difficult to execute and delayed the work many months; that the channel changes indicated on the Chamberlin profile were light, on flatter ground, and easy to construct; that the changes in line from that indicated on the Chamberlin survey did not begin until work on the contract had progressed several months.

There was further evidence tending to prove that plaintiff had a feasible plan of work approved by defendant's chief engineer that would have enabled plaintiff to complete the work within the time fixed in the contract if the work did not materially depart from that indicated on the Chamberlin survey; that this plan scheduled completion of grading work by the several contractors (naming them in the order of the location of their contracts beginning at Orofino) as follows:

Rumsey & Jordan	July 15, 1926
McVicar & Murphy	June 1, 1926
Bennett & Twohy	July 1, 1926
Schacht & Co.	July 30, 1926
Worth & Co.	September 1, 1926
Yeatman & Jackson	October 1, 1926

That this plan contemplated grading work in the winter of 1925-1926, but not in the winter of 1926-1927; that by October 1, 1926, [261] plaintiff in

performing its contract had moved a total yardage of 1,300,000 cubic yards; that almost arctic conditions prevailed in the Orofino Canyon in winter, and the winter of 1926-1927 was unusually severe; that under such conditions railroad construction work is very difficult, the efficiency of men being reduced approximately 50 per cent; that the monthly estimates made by defendant show that plaintiff in performing its contract with defendant moved 441,297 cubic yards of material between October 1, 1926, and March 31, 1927; that some of this winter work consisted of three of the more difficult new channel changes of the channel of Orofino Creek; that four of the larger channel changes were on the Rumsey & Jordan contract at the lower end of the projected railroad line, and three of them were performed in the winter of 1926-1927, and greatly delayed work on the contract above the points where these channel changes were being made.

There was further evidence tending to prove that early in the year 1926, when defendant began developing in construction work changes from the work indicated on the Chamberlin survey, plaintiff advised defendant that extensive changes would "bust" the schedule of work laid out; that claims for extra cost of work were made by plaintiff, but defendant's chief engineer requested that all claims wait until the end of the work.

There was further evidence tending to prove that the bridge plans adopted by defendant resulted in the construction of a number of bridges in Orofino

Canyon from the end of rail; that plaintiff was required to set mud blocks under water on leveled surface with dowel holes bored in the blocks to receive the bents, this work being done in the summer season; that delays in getting the track laid to the bridge heads threw the erection of bents and superstructure on a number of bridges into the winter of 1926-1927, when the work of erecting the superstructure was performed [262] under very difficult conditions, men seeking the dowel holes in mud sills under icy water, occasionally at such depths that diving suits were used, the weather being so severe that a man could remain in the water but a few minutes at a time; at times the water was so deep that the workmen entering the water had to do so with a cable from the shore attached to the workmen's waists.

There was further evidence tending to prove that plaintiff's performance of the contract was delayed in part by the conditions and circumstances hereinabove referred to, and the contract was not completed by September 1, 1927, but defendant permitted plaintiff to continue performance beyond said date.

Under date of July 8, 1927, defendant directed to plaintiff a letter notifying plaintiff to stop work covered by the contract between Orofino and Jaype Siding (which was approximately at mile post 21.25) on July 16, 1927; in said letter plaintiff was directed to continue work, in the following language:

> "You will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16."

Plaintiff continued work on its contract, and on October 7, 1927, defendant served on plaintiff another notice directing plaintiff to stop all work covered by the contract between the west switch of Jaype Siding and the east switch of Summit (which was approximately at mile post 33.7) on October 12, 1927; in said letter defendant again directed plaintiff as follows:

> "You will proceed with the completion of the contract work west of the east head block of Summit Siding, confining your operations to that portion of the line after October 12." [263]

When the invitation to bid for a contract to construct the line of railroad involved was sent to plaintiff it was accompanied with a form of proposal containing certain items for which bids were asked, among which was the following:

> "Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded

car return to the operated lines of the Company, per car mile, * * *"

The contract of the parties (Exhibit 9) provides that

"The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided, and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time herein specified, and according to the specifications hereto annexed and made part of this contract the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Orofino to Headquarters in the State of Idaho."

"The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927."

Included in the work for which prices are named in the contract is the item therein numbered 72, which provides for

"Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and

in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile - - - - - - $1.00." [264]

In the contract specifications are the following provisions:

"6. Contractor shall handle with his own work train, prior to date line is turned over to operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service, and in the service of other contractors. The specified contract price per car mile to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site, and loaded car return to the operated lines of the Company.

"15. * * * After the track has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight.

"19. * * * Side tracks or spurs put in by the contractor on his own initiative shall not be paid for, and shall be removed by the contractor on the completion of the work without expense to the Company.

"22. Running surface consists of putting track into condition to preserve the rail, fast-

enings and expansion from injury by the passing of construction or other trains until such time as ballasting is done. * * * Running surface shall be made and maintained by the contractor without expense to the Company.

"26. * * * Track shall be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer.

"34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be maintained by the contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until its is fully completed."

The evidence tended to show that defendant in April 1927 filed its log tariff with the Interstate Commerce Commission; that thereafter plaintiff hauled some logs of the Clearwater Timber Company under direction of the defen- [265] dant's engineer; that defendant did take possession of the road from Orofino to Jaype Siding on July 16, 1927, and did take possession of that portion of the road between Jaype Siding and the east switch of Summit on October 12, 1927, and did take possession of all of the road October 25, 1927, and over all of said portions of the road so taken did conduct the commercial haul and excluded plaintiff therefrom. It was admitted at the trial that the

total number of car miles of commercial freight at $1.00 per car mile transported by defendant over the line under construction from July 17, 1927, to October 25, 1927, amounted to $304,301.08, and the amount of commercial freight at $1.00 per car mile transported by defendant over the line under construction between July 17, 1927, and December 31, 1927, amounted to $443,184.70. Qualified witnesses for plaintiff testified as to the probable cost to the contractor (plaintiff) of conducting this commercial business for the periods mentioned. The estimates ranged from a minimum figure of $490.10 per day to a figure of $595.90 per day, and the witness who furnished the higher figure made a further allowance of $20,000 for wrecks, maintenance of equipment, damage claims and the like, raising his total to $714.95 per day for the periods above named. The defendant from its records furnished evidence tending to show what the actual cost to defendant of maintaining and operating the railway line in connection with this commercial business between July 17, 1927, and October 25, 1927, amounted to $104,757.44, and the like cost for the period from July 1, 1927, to December 31, 1927, amounted to $178,229.84, or a cost averaging slightly more than $1,060.00 per day for the longer period, and $1,037.00 per day for the [266] shorter period. The defendant further produced testimony tending to show that such cost was a reasonable cost for a railroad operating under the conditions and restrictions imposed upon an interstate railroad subject to jurisdiction of the Interstate Commercial

Commission. The testimony furnished by the plaintiff was as to conducting the commercial haul with the equipment used by and under the conditions under which the plaintiff would work. The auditor found that the sum of $72,209.95 would fairly represent the cost to the contractor of handling the commercial business which was in fact hauled by the railway company over the new line for the period beginning July 17, 1927, and ending October 25, 1927, and that the sum of $120,111.60 would fairly represent the cost to the plaintiff of handling the commercial hauling which was in fact hauled by the railway company over the newly constructed line for the period from July 17, 1927, to December 31, 1927. [267]

There was further evidence tending to prove that on October 25, 1927, defendant took charge of the entire line and excluded plaintiff therefrom, and defendant proceeded to complete the work on said line of railroad through its construction department, and did not deliver said road to the operating department of defendant until December 31, 1927.

Before the case was submitted, plaintiff requested the court to make the following finding, being request number XI, which request the court refused:

> "Defendant did not settle upon a definite program promptly as should have been done in order to finish the work in the time for building of the bridges required under weather conditions contemplated. During the early stages of the work the use of local timber was con-

templated. In January 1926 defendant definitely determined to use timber shipped from the Pacific Coast on a major portion of the bridges, and so notified plaintiff; also in June 1926 defendant determined to use a type of construction not mentioned in the representations upon which plaintiff bid, consisting of bents located on mud blocks set in level excavation under water. The type adopted is not usual or customary in bridge construction, is much more expensive to erect *in clement* weather, and very much more expensive to erect under the conditions that prevailed when the majority of the bridges were erected by plaintiff. In addition, the number of bents was increased materially over the plan submitted to plaintiff, thereby increasing the amount of underwater work. Bridge plans were delivered to the contractor piecemeal and late, the last not reaching the contractor until late in the summer of 1926."

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make requested finding number XI or something equivalent thereto."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XII, which request the court refused: [268]

"The division of work among subcontractors, which was approved by defendant's chief engi-

neer, contemplated that grading on the first 15 miles out of Orofino would be finished July 15, 1926, all of the grading in the canyon by September 1, 1926, and grading on the upper portion of the line near Headquarters by October 1, 1926. Under this plan all difficult work, including substructure of bridges, would have been completed by October 1, 1926, and the superstructure could have been erected above water. Plaintiff was sufficiently financed and equipped to and would have performed the work in the time fixed but for delays caused by changes in character and quantity of work by defendant. These changes so delayed plaintiff's work that many of the bridges had to be erected in the second winter under terrible hardship and at greatly increased cost. Also many channel changes and heavy grading had to be performed in the second winter at increased cost."

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested finding number XII or something equivalent thereto as essential to understanding the delay in completing work caused by the conduct of defendant and the hardships imposed upon plaintiff thereby."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding,

being request number XVII, which request the court refused:

> "Bridges were numbered beginning at No. 1, near Orofino, and working up toward Headquarters. Winter work and difficulties caused by piecemeal construction involved the bridges after bridge No. 8. Defendant required plaintiff to set the mud blocks in place under water during the summer of 1926, with holes bored in the parts under water into which dowel pins were to be fitted when the bents were ready for erection. Changes in plans and amount of work so delayed the grading that the erection of bridges was compelled to be performed in the second winter. The winter of 1926-1927 was severe along Orofino Creek; heavy rain, snowfall and icy conditions prevailed. The water in the creek was high and the work of fitting dowel pins into holes was performed under these conditions. The cost and value of bridge work because of delay caused by defendant was increased at least $84,004.00." [269]

To the refusal to make said finding, plaintiff reserved the following exception:

> "Plaintiff excepts to the court's refusal to make plaintiff's requested finding XVII, plaintiff contending that the evidence supports and justifies such finding and that it is necessary to an understanding of the conduct of defendant causing an extension of time for completion of the contract."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XVIII, which request the court refused:

> "Changes in plans by defendant delayed and broke up the track laying, causing the laying of only short stretches of track at a time, some of it on soft unfinished grades, and then waiting for embankment on changed and difficult portions of the road. The extra cost and value of track laying caused by these changes was $34,613.00 in excess of what the cost and value would have otherwise been."

To the refusal to make said finding, plaintiff reserved the following exception:

> "Plaintiff excepts to the refusal of the court to make plaintiff's requested finding XVIII, plaintiff contending that the evidence supports and justifies said finding and that it is necessary to an understanding of the delay caused by defendant extending the time within which plaintiff should complete its entire contract."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XIX, which request the court refused:

> "The increase in the amount of work over that represented to plaintiff was gradual. Plaintiff was not advised of the proposed changes until they were reached in the work and had no

opportunity to plan therefor. Plaintiff moved more than the amount of yardage represented in the invitation to it to bid and shown on the profile on schedule time and before October 1, 1927, and was adequately financed and equipped and had proper organization and plans for the work represented when plaintiff bid, and could and would have completed the represented work on schedule time." [270]

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested finding XIX, plaintiff contending that the evidence supports and justifies said finding, that it is in accord with the facts and that it is necessary to an understanding of the delay in completion of the contract caused by defendant's conduct and the extension of time of performance thereby."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XXII, which request the court refused:

"The changes in plans and character of work and overrun in yardage prevented plaintiff finishing the contract within the stipulated time. Under direction of defendant plaintiff continued the contract beyond the stipulated time and defendant accepted the work."

To the refusal to make said finding, plaintiff reserved the following exception:

> "Plaintiff excepts to the refusal of the court to find as requested in plaintiff's requested finding number XXII and to the modification of said finding."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number II, which hequest the court refused:

> "Plaintiff was adequately financed to perform the job represented and had plans and organization to complete the work within the time fixed by the contract and would have so completed the job but completion was delayed by conduct of defendant and time to finish the work extended accordingly."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

> "Plaintiff excepts to the refusal of the court to make plaintiff's requested conclusion of law number II."

which exception was duly allowed by the court. [271]

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number VI, which request the court refused:

> "Defendant did not have the right to take over portions or any of the road before it was finished and itself do the finishing work on the

part taken over under either the "stop work" clause or the "change of work" clause of the contract, and its action in this respect breached the contract. Plaintiff is entitled to recover the net profits of the commercial haul of which it was deprived, as found by the court."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested conclusion of law number VI in so far as the court in the conclusion of law made by the court limited plaintiff's recovery for the commercial haul to the sum of $125,000 net and limited the right to conduct the commercial haul to September 1, 1927."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number X, which request the court refused:

"A final estimate was not certified by the chief engineer as provided in the contract, nor payment made to plaintiff. Such final estimate should have been submitted and payment made by February 1, 1928. Plaintiff is entitled to recover interest on all sums due at the rate of six per cent per annum fom February 1, 1928."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested conclusion of law number X."

which exception was duly allowed by the court.

The court made the following finding of fact, being number IX: [272]

"The contract between the parties contemplated and required the construction of bridges such as those actually built by plaintiff and its subcontractors in the performance of the work, both with respect to foundations and superstructure. No change was required by defendant in this class of work from what was contemplated when the contract was entered into."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding number IX made by the court in that it fails to take into consideration the fact that the plans of work laid out by plaintiff and approved by defendant contemplated heavy grading and bridge work only in the first winter."

which exception was duly allowed by the court.

The court made the following finding of fact, being number X:

"The additional yardage, the increased number of channel changes, the decreased number of bridges, whether changes from the work contracted for or merely changes from preliminary estimates made before the contract was entered

into, did not make the unit prices of the contract inapplicable and did not affect such prices within the meaning of the provision of the contract authorizing changes in the work."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding number X made by the court because it does not properly represent the fact of the original representations when bids were made and the departure therefrom in actual work."

which exception was duly allowed by the court.

The court made the following finding of fact, being number XVI:

"By permission of the defendant, the plaintiff continued the contract beyond the stipulated time and the defendant accepted the work, but the defendant did not permit the plaintiff to conduct any commercial hauling over the portions of the road taken over by the defendant."

To the making of said finding of fact, plaintiff reserved the following exception: [273]

"Plaintiff excepts to finding number XVI made by the court in so far as it constitutes a modification of plaintiff's requested finding number XXII and in so far as it holds that the time for completion of the entire contract was not extended by defendant's conduct; defendant contends that denying plaintiff the right to conduct the commercial hauling was just as

wrongful after September 1, 1927, while plaintiff was continuing with the contract as it was prior to that date."

which exception was duly allowed by the court.

The court made the following finding of fact, being number XVIII:

"It was admitted at the trial that the total number of car miles of commercial freight at $1.00 per car mile transported by defendant over the line under construction July 17, 1927, to October 25, 1927, amounted to $304,301.08, and July 17, 1927, to December 31, 1927, amounted to $443,184.70. The auditor found the fair cost of such transportation by plaintiff would have been $72,209.95 for the shorter period, and $120,111.60 for the longer period. The court approves these findings, but the court finds that the plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; that the plaintiff was prepared to conduct such haul, and was damaged in the sum of $125,000 by being deprived thereof up to September 1, 1927; that the right to conduct said commercial haul terminated on that date. The court further finds that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927."

To the making of said finding of fact, plaintiff reserved the following exceptions:

"Plaintiff excepts to that part of finding number XVIII made by the court in which the court refuses to permit recovery for the socalled commercial haul up to and including October 25, 1927, and up to and including December 31, 1927, and in which the court finds plaintiff's right to conduct the commercial haul terminated September 1, 1927, and in which the court finds the question of extension of time for completion of the contract by defendant's conduct was not made an issue by plaintiff's pleadings, plaintiff contending that the issue of delay in the completion of the contract by defendant's conduct and extension of time for completion thereby is tendered in plaintiff's complaint."

which exception was duly allowed by the court;

[274]

"Plaintiff excepts to that portion of finding XVIII made by the court in so far as it holds that only $125,000 are due plaintiff on account of the commercial haul."

which exception was duly allowed by the court;

"Plaintiff excepts to the failure and refusal of the court to allow interest from February 1, 1928, on the sum of $125,000 allowed on account of the commercial haul in finding number XVIII, plaintiff contending that the contract required all amounts earned by plaintiff to be paid by February 1, 1928, and that this sum became due at that date and interest at the rate of six (6) per cent per annum thereon should

be allowed from that date and any less allowance would deny plaintiff fair compensation or adequate relief."

which exception was duly allowed by the court.

The court made the following conclusion of law, being number II:

"Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of	$ 8,865.75
with interest thereon at six per cent per annum from February 13, 1930	
On the commercial haul, the sum of	125,000.00
without interest prior to judgment	

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	$ 26,843.47
For hauling piling,	4,693.29

For hauling bridge metals, without interest prior to judgment." 1,249.69 [275]

To the making of said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to conclusion of law number II made by the court in so far as said conclusion limits the plaintiff's recovery on the commercial haul to $125,000 and in so far as said conclusion denies the allowance of interest at six (6) per cent per annum on the amount allowed from February 1, 1928, and in so far as said conclusion denies interest at six (6) per cent per annum on the amount found to be due for hauling materials, said interest to run from February 1, 1928."

which exception was duly allowed by the court.

The contract between the parties to this litigation was at trial admitted to be in form and substance as set forth in Exhibit "A" of defendant's answer. Said contract fixes the unit prices to be paid for the work therein provided. Among those unit prices are the following, as set forth in the contract:

Hauling piles furnished by the company per lineal foot mile	$ .02
Hauling timber furnished by the company per thousand feet b. m. mile	.85
Hauling metal fastenings per ton mile	.65

There was evidence introduced tending to show (and there was no controversy on this point) that the plaintiff during the performance of its contract hauled piling furnished by the defendant (company) for which, at the rate of 2¢ per lineal foot mile, the plaintiff should have been paid $5,353.78, but that defendant paid of said amount only $660.49; that the plaintiff hauled timber furnished by the defendant (company), for which, at the rate of 85¢ per thousand feet b. m. mile, plaintiff should have been paid $47,253.99, but that defendant paid of said amount only $20,410.52; that the plaintiff hauled metal fastenings furnished by the defendant (company), sufficient in quantity, at 65¢ per ton mile, to amount to $2,563.31, but that defendant paid of said amount only $1,313.62. [276]

Before said cause was submitted, plaintiff duly requested the court to make the following conclusion of law, being request number X, which request the court refused:

> "A final estimate was not certified by the chief engineer as provided in the contract, nor payment made to plaintiff. Such final estimate should have been submitted and payment made by February 1, 1928. Plaintiff is entitled to recover interest on all sums due at the rate of six per cent per annum from February 1, 1928."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

> "Plaintiff excepts to the refusal of the court to make plaintiff's requested conclusion of law number X."

which exception was duly allowed by the court.

The court made the following finding of fact, being number XIX:

"The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile,	$ .02
Hauling timber furnished by the company per thousand feet b. m. mile,	.85
Hauling metal fastenings per ton mile,	.65

[277]

"These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount, leaving unpaid and due to plaintiff on this item $26,843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid $5,353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item

$4,693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2,563.31. The defendant has paid but $1,313.62 of this amount, leaving unpaid and due the plaintiff on this item $1,249.69."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to the failure and refusal of the court to allow interest from February 1, 1928, at the rate of six (6) per cent per annum on the sums found to be due and unpaid for hauling bridge materials in finding number XIX made by the court, plaintiff contending that this sum was at all times definite and known, that plaintiff was entitled to either the amount demanded or nothing, that the only question involved was a question of the right of the defendant to refuse to pay the contract price and that under the contract this money was due and payable February 1, 1928, and anything less than interest at the legal rate would deny plaintiff fair compensation."

which exception was duly allowed by the court.

The court made the following conclusion of law, being number II:

"Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight

over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of [278] said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of with interest thereon at six per cent per annum from February 13, 1930	$ 8,865.75
On the commercial haul, the sum of without interest prior to judgment	125,000.00

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	$ 26,843.47
For hauling piling,	4,693.29
For hauling bridge metals, without interest prior to judgment."	1,249.69

To the taking of said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to conclusion of law number II made by the court in so far as said conclusion limits the plaintiff's recovery on the commercial haul to $125,000 and in so far as

said conclusion denies the allowance of interest at six (6) per cent per annum on the amount allowed from February 1, 1928, and in so far as said conclusion denies interest at six (6) per cent per annum on the amount found to be due for hauling materials, said interest to run from February 1, 1928."

which exception was duly allowed by the court.

On February 25, 1937, findings of fact and conclusions of law were made by the court, and on the same date the court entered judgment for plaintiff. [279]

Prior to making and filing its said findings of fact and entering its said judgment the court rendered an oral opinion as follows:

"The Court: I will render the opinion in the case of Twohy Brothers Company v. Northern Pacific Railway Company.

"I will say at the outset, gentlemen, that, although I have taken considerable time for investigation of this case, my opinion consists largely at this time of statement of conclusions without any careful statement of the underlying law involved. I will make no statement of facts, because the facts are extremely well outlined in the report of Evrett A. Johnson, the Auditor, and in most instances the Court agrees with him in his conclusions of fact, after examination of the record. The places where I do not agree will be noted in the opinion.

"There is one matter which was settled by agreement between the parties before submission to the Court. This was the amount due upon the final estimate. This was fixed at $8,865.75, which will be allowed.

"This case has been pending for many years; it was tried before an auditor under the supervision of the late Judge Bean. After the report was submitted it was transferred to the present Judge for further proceedings. It was once set for dismissal under rule of court requiring some action to be taken in any cause within a year. The dismissal was not granted because of the showing of willingness to proceed. Thereafter local counsel were changed and an amended complaint tendered. On account of the history of the case the Court imposed upon the plaintiff the requirement that it pay one-half of the fees of the hearing before the Auditor before filing an amended complaint. These terms were not accepted. The statute of limitations against the action had run at that time, whether it was upon contract or for damages for breach of contract or on quantum meruit. But if the 'operative facts' be regarded instead of the technical 'cause of action' it would still work an injustice to defendant to allow plaintiff to shift its ground after the 'statute of repose' had expired.

"The Auditor finds, as far as the construction claims in this case are concerned, that the whole pleading is based upon the theory that

the action was for damages for breach of contract. The Court agrees with this interpretation of the complaint itself. The Court further construes [280] the contract as an agreement for the building of a line of railroad between two fixed terminals. There is no suggestion in the contract itself nor in the other evidence before the Court that there was any plan upon the part of the Railroad Company or of the Contractor that the line should be confined to the limits of the Chamberlain survey. Insofar as evidence was admissible upon the subject at all the Court finds that there was no misrepresentation upon the part of the Railroad Company as to this proposition. The Contractor knew of the conditions and had almost as much opportunity to investigate the fitting of the line to the country through which it was laid as did the Railroad Company. Chamberlain was not an employe of the Railroad Company at the time that the line was surveyed by him and it was not responsible for his judgment. Proceeding upon this basis the Court finds no theory upon which there could be based an award for breach of contract because the defendant misrepresented the situation of the railroad line. According to the contract the plaintiff was to be paid for its labor and material based upon the work done. To this stipulation the plaintiff is bound as part of its agreement.

"There was a great deal of testimony taken as to changes of the line. As I read the con-

tract, this was all taken care of by exact stipulation of the agreement and that, therefore, the plaintiff can not recover on the theory that the entire basis of the contract was changed by delay caused by the Railroad Company during construction or caused by the changes of line, shifting the work into a more difficult period of the year. The Contractor as well as the Railroad Company knew that this line was to be built through Orofino Canyon and both parties were required to take notice of the fact that sub-arctic conditions, practically, prevail in that territory, at least in some winters. This contract covered a period of winter time as well as summer time, and, therefore, working under normal conditions, the Contractor must have expected to do work in the winter time, and, having stipulated that it was to build the line where directed by the Railroad Company in Orofino Canyon and to accept for the work done the prices stipulated in the contract, it is bound thereby.

"A great deal of testimony was offered as to how much labor and material would have been required if the line had been built in exact accordance with the Chamberlain survey. This testimony will be rejected, because it is entirely immaterial. There was no misrepresentation in the negotiations or the contract itself. The Railroad Company reserved full power to build the line as it desired and as the circumstances dictated. Plaintiff was a free agent and was not

required to bid upon or enter into such a contract as it signed. [281]

"This reduces the construction claims to one simple question of breach of contract. The matter of the allowance of additional compensation by the Engineer under the 'substantial justice' clause is one which was committed to the sole judgment of the Engineer if exercised impartially. Plaintiff did not properly call this stipulation into play. The claim should have been filed upon this language and supported by reference to the cost of the work to the contractor. Some foundation would then have been laid for a determination by the Court if the Engineer had arbitrarily refused to make any award or had made an insufficient award.

"There certainly is before this Court no thorough cost accounting upon the work as a whole from which the Court could judge whether the refusal of an allowance or an insufficient allowance by the Chief Engineer under the 'substantial justice' clause would constitute a breach of contract. But instead of standing on the strict letter of the contract plaintiff depended upon negotiations for settlement. In these negotiations the Engineer offered to pay $80,000, but the evidence was convincing that this proposal was in settlement of all claims and is based upon negotiations not carried on under the terms of the contract. It can not be transmuted into a declaration of a 'substantial justice' award. There is considerable doubt that the

Engineer had the data before him upon which he could base such award. It is true that after the signing of the supplemental contract the Railroad Company had an auditor with the Twohy Brothers. Whether there was a complete cost accounting or not the record is in doubt. It is only upon such a basis and upon profit and loss to the Contractor upon the project as a whole that 'substantial justice' could have been worked out. Thus there was no breach of contract in the failure of the Engineer to make such an award without a demand therefor.

"Since no award was made the Court can not impeach the Engineer's findings for bad faith, nor has the Court any evidence upon which an exact finding in lieu thereof based upon the cost and profit and loss to the Contractor could be made. Furthermore, these features can not be supplied by estimates of persons in the employ of the Contractor. These are only too subject to emotional and partisan error. Especially is this true where the witness, perhaps unconsciously, may be justifying his original cost figures upon which the bid was made.

"Upon no theory, therefore, can any claim upon the construction be allowed. This opinion is reinforced by the attitude of the officers of the Contractor during construction, and through [282] all the time of the taking of the testimony. The legal sub-strata attempted to be

used in shoring up these claims is an ingenious device which was struck upon after the testimony was taken and which can not supply the facts or change the original contract.

"The matter of classification of conglomerate is urged as a special feature. The Engineer of defendant allowed additional compensation or a special compensation for removing this material. A case might be made for a higher or a lower price, but upon the whole this allowance seems to have been made in good faith and to be reasonable.

"The claims for timber haul are upon an entirely different basis. These are founded upon the terms of the contract itself. The defendant definitely agreed to allow the plaintiff to haul by its own work train all commercial business for one dollar per car mile. Defendant drew the contract, and all of the implications are in favor of plaintiff. No contrary inference from the plain language of the stipulation can be drawn from the fact that it is included in the portion of the specifications referring to finishing. The defendant had not expected to haul timber upon the road at any time prior to June 1st, which was the date when the construction was all to have been completed, but the finishing was still to be done. It was therefore logical in chronological sequence to place these provisions concerning the haul by the trains of the Contractor with the stipulations as to finishing the line. The hauls could not be made until at

least a part of the line was completed. The stipulation itself is unambiguous and the Court therefore rejects as incompetent testimony of Twohy and Boss as to how the bid was made up.

"The court also rejects the argument and what evidence there is that the Railroad Company would not have hauled any logs if it had not intended the contract to be construed according to its present contention. It was not what the company intended but what the parties agreed to that binds the Court. The stipulation is perfectly plain and intelligible as it stands. The Chief Engineer attempted to justify the taking over of this portion of the line by the 'stop work' clause in the contract. If the railroad had abandoned the line for any reason sufficient to itself, or had stopped work upon any portion of the line for a period of time, or had commenced construction upon one route and subsequently had the work stopped there and allowed the plaintiff to construct the line between the same terminals over a different route, the Contractor would have been bound by the 'stop work' order and could not have recovered damages for any anticipated profits because of its issuance. [283] The Railroad Company has argued, and both the Auditor and the Court have accepted, the fact that the contract provided for the construction of a complete line of railroad between two terminals. If the defendant had stopped the work in good faith the plaintiff would have had no right of action ex-

cept for the work done, but this clause can not be used by the defendant, where the line was completed as contemplated, as an excuse for taking over part of the line before the date set for the completion of the whole and for robbing the plaintiff of a chance to do this specified incidental work at contract rates. It is suggested that a supplemental contract was entered and thereby the Contractor's rights cut off, but the subject is not mentioned in the supplemental agreement. Even if it be assumed that the plaintiff on account of its financial necessity might have yielded on this point, still it did not have the specific matter proposed to it in this light and no practical stipulation of any kind covered the point, except the one in the original contract. It is further contended that Mr. Twohy waived the fulfillment of this clause by defendant in his letter directed to Mr. Stevens, but it is elementary law that the stipulation of a contract can only be removed by supplemental agreement. Otherwise there is a single question: Was the particular stipulation fulfilled or was it broken? If observed it would be fulfilled and thereby erased from the contract. If broken, the promissor would be liable in damages which could not be waived. Performance of the conditions of the contract may be waived. Performance of the provisions of an agreement could not be. An estoppel is not pleaded, and in any event would not be a defense, since the railroad suffered no damage

and did not rely upon the statements of Mr. Twohy to its injury.

"The Auditor suggests that there are further questions,—whether this matter is one which could have been submitted to the Chief Engineer for determination; second, whether the letter from Mr. Twohy constituted a submission of this controversy to the Engineer and the usual formalities of notice and hearing waived. To this may be added the question whether the Chief Engineer acted or presumed to act under the arbitration clause, and, further, whether his attitude was impartial or was so arbitrary as to amount to constructive fraud. All of these questions must be determined in favor of the plaintiff: First, there is no binding authority that requires this Court to decide that in this type of a contract an employe of one of the parties can by stipulation be allowed to determine what both parties meant by the terms of the agreement. Whatever may be the rule under other types of arbitration, this Court determines that the interpretation of the law governing the construction of the clause of the contract can not be so submitted. [284]

"Mr. Twohy in his letter to the Chief Engineer in answer to the suggestion of that official that the latter had the power of construction and this power was arbitrary agreed under the duress of the existing situation, but he certainly did not say or apparently intend

that this should be taken as a submission of the specific question without further notice or hearing. Mr. Stevens' own attitude was from the inception arbitrary in the extreme in the matter. He was acting avowedly in the interest of his employer, the Railroad Company. He did not act or assume to be acting under the arbitration clause. He fortified himself by an opinion from the attorneys of the company before dealing with the question. He used his assumed power under the agreement as a threat to compel compliance. Under those circumstances he is far from being the impartial arbitrator required by the law. If there had been a determination by him after submission or hearing the Court would have set such decision aside for constructive fraud based upon his attitude.

"The question remains as to how much should be assessed for damages for breach of this clause of the contract. The contract ended by its terms September 1st, 1927, but the road was to have been turned over to the operating department of the Railroad Company by that date. The Contractor breached its obligation to do so. However, the delays and extra expense caused by the Railroad Company might well have been used as a defense for such a claim by the defendant. It, however, does not even raise the point. On the other hand, the plaintiff can not rely upon its own breach or the sufferance of the defendant in permitting it to complete the work by remaining until

October 25th as extending to that time the profitable log haul stipulation in the agreement, where the hauling of the logs had already been taken over by the Railroad Company. But, although figures were presented in detail for other periods, there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st. The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at $125,000. If the parties agree, however, further proof may be submitted upon this issue to find the damage more accurately.

"The claims for hauling materials can be considered together. As to all these disputed items the price was fixed under the language of the document for 'hauling' thereof. The defendant claims so far as haul by rail is concerned that the moving of these materials took place under the clause providing for the handling of material in empty cars used in the service of the Contractor. There is another clause providing that the maximum team haul of materials should not exceed four miles except [285] on written order of the Engineer. This latter stipulation effects an ambiguity upon the word 'hauling', so that the Court will permit the testimony as to the preliminary negotiations. In two other clauses, relating to furnishing materials and placing concrete, where the words 'team haul' were used the

Chief Engineer eliminated these words during the negotiations and substituted therefor the word 'hauling'. He thereupon added a new item to the Contractor's bid of 'haul of concrete aggregate', which would have to be done by rail. It is true that the items relating to furnishing of materials and placing concrete in bridge pedestals and piers was reduced materially. It seems obvious that the word 'hauling' as used in all phases of the contract was thus intended to mean haul by rail as well as by other means.

"The questions as to whether there was submission for arbitration, whether a law question could be so submitted, whether the Engineer acted under this submission, or whether any decision by the Engineer could stand considering this attitude in these particular claims, have been adequately discussed and are decided in favor of the plaintiff.

"The Court, therefore, awards in damages for breach of the stipulation for hauling the timber $26,843.47; for breach of the stipulation as to hauling piling, $4,693.29; for breach of the stipulation for hauling metal fasteners, $1,249.69.

"The Court, as it stated at the outset, considers this an action on the contract for damages and for breach thereof. It is not an action for amounts due under a written contract. If this were true a great many of the questions involved in the complaint could not have been

tried or considered. The Court therefore feels that under the Oregon statute it is not bound to allow interest from the date of final estimate but rather is required to allow interest only from the date of entry of the judgment in damages.

"Findings and judgment will enter accordingly."

The United States District Court for the District of Oregon has standing rules 41 and 42, as follows:

"When an exception is taken, as provided in Rule 40, within ten days after judgment the party taking the same must prepare, in due form, a bill of exceptions, and deliver it to the clerk, for the judge, and serve a copy thereof on the attorney of the adverse party, who may, within five days thereafter, in like manner deliver and serve amendments thereto, and within five days thereafter the [286] party taking the exception may serve a notice upon the attorney of the adverse party, to the effect that he objects to the amendments, and will, at a time not less than three nor more than five days thereafter, apply to the judge at his chambers to settle and sign the bill of exceptions.

"If a bill of exceptions is not delivered and served in due time, the exceptions will be deemed abandoned; and if an amendment thereto is not delivered and served in due time, the bill of exceptions will be deemed assented to; and if such an amendment is delivered

and served and no notice of objection thereto is thereafter duly served by the party taking the exceptions, the same will be deemed assented to by said party.

"A proposed bill of exceptions, and the amendments thereto, if any, are to be considered and submitted to the judge for examination and allowance, without any further notice or action by either party, whenever, according to Rule 41, such bill, or bill and amendment, is to be taken as assented to by the adverse party; and when the same is found or made to conform to the facts it will be allowed and signed by the judge and directed to be filed."

On February 27, 1937, the following order was entered by the above entitled court:

"In the District Court of the United States
For the District of Oregon

No. L-10532

TWOHY BROTHERS COMPANY, a corporation,

Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS AND EXTENDING TERM OF COURT

Upon application of defendant,

It is Ordered that the time within which

either party hereto may submit a bill of exceptions for allowance, certification and filing is hereby extended to June 1, 1937.

It is further Ordered that the present term of court be and is hereby extended to June 1, 1937, for the purpose of submission, allowance, certification and filing of bill of exceptions in this action, and for the purpose of granting any further extension of time which the Court may order.

Dated February 27, 1937.

JAMES ALGER FEE
District Judge''

[287]

Forasmuch as the above and foregoing matters and things do not fully appear of record, and the above and foregoing bill of exceptions was duly and regularly served on defendant's counsel, and filed with the clerk of this court, within the time duly fixed by this court, during the term in which the judgment in this cause was made and entered, and the court having examined said bill of exceptions and finding the same fair and correct, now, upon due notice to counsel, the same is settled, allowed and approved, this 19th day of May, A. D. 1937, and it is ordered that said bill of exceptions be filed and the same hereby is made a part of the record in this cause.

JAMES ALGER FEE
United States District Judge

[Endorsed]: Filed May 19, 1937. [288]

And to wit, on the 18th day of May, 1937, there was duly filed in said Court, a petition by defendant for appeal, in words and figures as follows, to wit: [289]

[Title of Court and Cause.]

PETITION FOR APPEAL AND FOR ORDER FIXING AMOUNT OF BOND

Now comes defendant, Northern Pacific Railway Company, a corporation, and feeling itself aggrieved by the final judgment of the Court entered herein on the 25th day of February, 1937, in favor of plaintiff and against defendant, hereby prays that an appeal may be allowed to it from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herewith.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal, and that a proper transcript of the record of proceedings and papers upon which said judgment was made, truly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

L. B. DAPONTE
CHARLES A. HART
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Appellant

[Endorsed]: Filed May 18, 1937. [290]

And afterwards, to wit, on the 18th day of May, 1937, there was duly filed in said Court, by defendant, an assignment of errors, in words and figures as follows, to wit: [291]

[Title of Court and Cause.]

DEFENDANT'S ASSIGNMENTS OF ERROR

Now comes defendant herein and in connection with its petition for an order allowing an appeal in this cause, assigns the following errors which defendant avers occurred on the trial of the cause and upon which defendant relies to reverse the judgment entered herein as appears of record:

(Assignments I to XIV, inclusive, relate to ruling interpreting contract to give plaintiff the right to conduct operations on the railroad to be constructed.)

I.

The District Court erred in ruling that the contract between the parties, dated October 15, 1925, for the construction of the so-called Orofino Branch of defendant's railroad, gave plaintiff the right to retain possession of the newly constructed line and to conduct all commercial operations thereon, until the date fixed by the contract for completion of the work contracted for. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its [292] Requested Findings of Fact

Nos. XV, XVI and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, required and permitted plaintiff to conduct transportation operations on the railroad, as constructed, only in its work trains as called upon to do so by defendant, as an incident to the construction work, and did not prevent defendant from taking over and making use of any part of its railroad whenever it was deemed ready for such use.

II.

The District Court erred in ruling that the contract between the parties denied defendant the right to take over and use any part of the railroad to be constructed, in advance of the date specified in the contract for completion of construction, whenever defendant deemed such part to be sufficiently completed for use. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its Requested Findings of Fact Nos. XV, XVI, and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, permitted defendant to use its property as soon as it deemed said property to be ready for use.

III.

The District Court erred in ruling that the contract between the parties did not permit defendant to take possession of and to use any part of the railroad to be constructed, by reason of the provisions of the contract authorizing defendant [293] to stop work or any part thereof or to change the amount of work to be done under the contract. Said ruling was made in the Court's order denying defendant's motion to make and adopt its Requested Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, gave defendant the right to stop any part of the work required of plaintiff; or to change the amount of work to be done by planitiff under the contract.

IV.

The District Court erred in ruling that plaintiff is entitled to recover damages from defendant for loss of opportunity to conduct transportation operations on said railroad, measured by the volume of business actually done by defendant. Said ruling was made in the Court's order denying defendant's motion to adopt its Requested Conclusion of Law No. IV and in the making and adopting of Finding of Fact No. XVIII and Conclusion of Law No. II, and is erroneous in that defendant was not legally obligated to accept any commercial traffic, and the volume actually handled by defendant cannot be taken as the measure of what would have been accepted for transportation, if plaintiff had

been permitted to remain in possession of the part of the railroad taken over by defendant.

V.

The District Court erred in holding and determining that defendant, in taking over and operating in commercial log haul transportation, between July 17, 1927, and September 1, 1927, the first 29 miles of the railroad constructed under the terms of the contract between the parties, breached its obligations under said contract. Said holding and determina- [294] tion was made in the making and adoption of Finding of Fact Nos. XV and XVIII, respectively, and Conclusion of Law No. II, and in the order denying defendant's motion to make and adopt its Requested Finding of Fact No. XVI and Conclusions of Law Nos. II, III, IV and V, respectively, and is erroneous in that the contract between the parties, correctly interpreted, gave defendant the right to take possession of and use said portion of said railroad, at the time such possession was taken.

VI.

The District Court erred in making and adopting the following "Finding of Fact" in that said Finding misinterpreted the contract between the parties, as specified in the foregoing assignments of error Nos. I, II and V, respectively:

"XV

The contract gave plaintiff the right to conduct commercial hauling while the line was

under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of $10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

'NORTHERN PACIFIC RAILWAY COMPANY

Engineering Department
St. Paul, Minn. July 8, 1927.

[295]

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino

and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. Stevens'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

'NORTHERN PACIFIC RAILWAY COMPANY

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by

your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and [296] other material required for the completion of your contract.

Yours truly,
H. M. Tremaine,
Assistant Engineer.'

This was answered by Twohy Brothers as follows:

'Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,
TWOHY BROTHERS COMPANY,
By ,

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do [297] it was required of the plaintiff under its

contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927."

VII.

The District Court erred in adopting the following Conclusions of Law in that said Conclusions misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. I, II, III, IV and V, respectively:

"II

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of $ 8,865.75
with interest thereon at six per cent per annum from February 13, 1930
On the commercial haul, the sum of 125,000.00
without interest prior to judgment.

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers, $26,843.47
For hauling piling, 4,693.29
For hauling bridge metals, 1,249.69
without interest prior to judgment." [298]

"III

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred."

VIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XV

Under the terms of the construction contract, plaintiff was required to complete ballasting

and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

IX.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVI

Defendant made no commitment of any kind to [299] anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

X.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVII

Plaintiff, during the negotiations leading up to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of $1.00 per car mile therefor."

XI.

The District Court erred in denying defendant's motion, made before final submission of the cause,

for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion:

"II

Plaintiff was not entitled, under its contract with defendant, to retain possession of any [300] part of defendant's branch line of railroad, after tracklaying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof."

XII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after track-laying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time."

XIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor."

[301]

XIV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Concluusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"V

Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover upon its claim for damages for alleged breach of contract in this particular."

(Assignments XV to XXV, inclusive, relate to decision interpreting contract as to prices payable for transportation of timbers, piling, and bridge metals.)

XV.

The District Court erred in ruling that the contract between the parties entitled plaintiff to payment at the rates specified in Price Item 37 (2 cents per lineal foot per mile), Price Item 38 (85 cents per M per mile), and Price Item 39 (65 cents per ton per mile), of the contract for the haul of piling, timber and metal fastenings, respectively, which were in fact transported by rail. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VI, and in the making and adoption of Finding of Fact No. XIX and Conclusions of Law Nos. II and III, respectively, and is erroneous in that the contract, correctly interpreted, makes said prices applicable to piling, timbers, and metal fasten- [302] ings hauled otherwise than by rail.

XVI.

The District Court erred in ruling that the question in dispute between the parties, as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, respectively, was not a matter for submission to the chief engineer under the arbitration clause of the contract. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX, and is erroneous in that the contract, properly interpreted, made such a dispute a matter to be submitted to and decided by said chief engineer.

XVII.

The District Court erred in holding and determining that the question in dispute between the parties as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, was not submitted to the chief engineer or decided by him under the arbitration clause of the contract. Said holding and determination was made in the Court's order denying defendant's motion for the adoption of its Requested Finding of Fact No. XVIII and Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX and Conclusion of Law No. II, and is erroneous in that the submission of said dispute to said chief engineer and the decision thereof by him were established by uncontradicted written evidence.

XVIII.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinter- [303] preted the contract between the parties, as specified in the foregoing Assignment of Error No. XV:

"XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile	$ .02
Hauling timber furnished by the company per thousand feet b.m. mile	.85
Hauling metal fastenings per ton mile	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount, leaving unpaid and due to plaintiff on this item $26,-843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid $5353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item

$4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2563.31. The defendant has paid but $1313.62 of this amount, leaving unpaid and due the plaintiff on this item $1249.69."

XIX.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XVI and XVII, respectively:

"XX

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX was not submitted to the chief engineer for decision, was [304] not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

XX.

The District Court erred in adopting the following Conclusion of Law in that said Conclusion misinterpreted the contract and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XV, XVI, and XVII, respectively:

"II

Defendant breached its contract by * * * refusing to pay the plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, * * * Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers	$26,843.47
For hauling piling	4,693.29
For hauling bridge metals	1,249.69

without interest prior to judgment."

XXI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony: [305]

"XVIII

During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber

and piles and metal fastenings described in the complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of $1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of $1.00 per car mile."

XXII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony:

"XIX

After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

XXIII.

The District Court erred in denying defendant's motion, made before final submission of the cause,

for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion: [308]

"VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term 'team haul' as used in the contract meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track."

XXIV.

The District Court erred in denying defendant's motion made before final submission of the cause, for an order adopting the following Requested Conclusion of Law in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute."

XXV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order adopting the following Requested Conclusion of Law, in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"VIII

Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials." [307]

XXVI.

The District Court erred in making and adopting the following Finding of Fact, holding and determining that defendant breached its contract in failing to render a final estimate at the conclusion of the work, in that said holding and determination is contrary to the uncontradicted testimony:

"XXII

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required."

Wherefore defendant and appellant prays that the judgment of the District Court be reversed.

L. B. DA CONTE
CHARLES A. HART
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant
and Appellant

[Endorsed]: Filed May 18, 1937. [308]

And afterwards, to wit, on Tuesday, the 18th day of May, 1937, the same being the 59th judicial day of the Regular March, 1937, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [309]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Defendant in the above entitled cause having filed in this Court its petition for an appeal from the final judgment herein dated February 25, 1937, accompanied by an assignment of errors and prayer for reversal,

It is hereby ordered that an appeal as prayed for in said petition be and is hereby allowed.

It is further ordered that the bond on appeal, conditioned as required by law, is hereby fixed at the sum of two hundred thousand dollars ($200,000) and said bond shall operate as a supersedeas and

cost bond and shall stay and suspend all further proceedings in this Court until the determination of said appeal.

Dated May 18, 1937.

JAMES ALGER FEE
United States District Judge.

[Endorsed]: Filed May 18, 1937. [310]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, a Bond on appeal in words and figures as follows, to wit: [311]

[Title of Court and Cause.]

BOND ON APPEAL.

Know all men by these presents, that the undersigned, Northern Pacific Railway Company, a corporation, as principal, and St. Paul-Mercury Indemnity Company, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder", as surety, are held and firmly bound unto Twohy Brothers Company, a corporation, in the full and just sum of

Two Hundred Thousand Dollars ($200,000)

to be paid to the said Twohy Brothers Company, a corporation, its successor or assigns; to which pay-

ment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon, in a suit pending in said Court between Twohy Brothers Company, a corporation, as plaintiff, and Northern Pacific Railway Company, a [312] corporation, a judgment was rendered against said defendant Northern Pacific Railway Company for the sum of $170,390.58 and costs; and the said Northern Pacific Railway Company, a corporation, having obtained an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company, a corporation, shall prosecute its appeal to effect and shall pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In witness whereof, the said principal and surety have executed this bond on this 18th day of May, 1937.

NORTHERN PACIFIC RAILWAY COMPANY
By CHARLES A. HART
Its Attorneys

[Corporate Seal] ST. PAUL-MERCURY INDEMNITY COMPANY
By CHARLES S. BARTON

The above bond on appeal is hereby approved:
JAMES ALGER FEE,
District Judge
JEWETT, BARTON, LEAVY AND KERN
By CHARLES A. BARTON
Agents

[Endorsed]: Filed May 19, 1937. [313]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, by plaintiff a Petition for Appeal in words and figures as follows, to wit: [314]

[Title of Court and Cause.]

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Now comes Twohy Brothers Company, by its attorneys, and respectfully shows that on the 25th day of February, 1937, the court found the facts and entered a final judgment in favor of petitioner-plaintiff and against defendant Northern Pacific Railway Company for the sum of $170,390.58, and plaintiff's costs and disbursements. The said cause is one wherein plaintiff is demanding recovery from defendants for breach of a railroad construction contract, and for failure to pay moneys due under said contract; plaintiff is a corporation organized under the laws of the State of Oregon, and defend-

ant is a corporation organized under the laws of the State of Wisconsin, and the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, a review could be had on writ of error.

Your petitioner feeling itself aggrieved by the said judgment entered as aforesaid herewith petitions the court for an order allowing it to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith, insofar as said judgment awards plaintiff less than the amount demanded in plaintiff's complaint. [315]

Wherefore, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States Circuit Court of Appeals.

DeLANCEY C. SMITH
W. LAN THOMPSON
McCAMANT, THOMPSON, KING & WOOD
Attorneys for Plaintiff

[Endorsed]: Filed May 19, 1937. [316]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, by plaintiff an Assignment of Errors in words and figures as follows, to wit: [317]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL.

Comes now Twohy Brothers Company, a corporation, plaintiff and appellant in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause assigns the following errors which appellant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein, to-wit:

Assignment of Error No. I.

This specification assigns error in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where the contract specifies a price per unit, or yard, of work, for a proposed railroad through the mountains, and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material and constitutes a representation upon which bidders must rely as to difficulties

and size of job, and in determining whether bidder can under- [318] take it. The only profile or description of work was that accompanying the invitation to bid.

In the year 1925 Northern Pacific Railway Company undertook the construction of a branch line of railroad into the timber of the Clearwater Timber Company, the road to extend from Orofino on the main line of the railroad company to Headquarters, a distance of 41 miles, through a rough, rugged mountain range.

Defendant let bids on a survey up the canyon of Orofino Creek made for the timber company by one Chamberlin, admittedly a competent locating engineer. On September 18, 1925, an invitation to bid was mailed by defendant in St. Paul, Minnesota, to plaintiff at Seattle, Washington, accompanied by profiles of the Chamberlin survey, showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. The profile contained all of the information of a final location, showing grade, curvature, and amount and classes of material to be moved; also with the invitation went a detailed description of the line shown on the profiles. Blank forms for filling in the bidder's price for all work on a unit basis accompanied the invitation, which advised bidders that there was a time limit for the work as the road was required to be ready to move logs for the Clearwater Timber Company by June 1, 1927. Plaintiff's bid was accepted and construc-

tion of the railroad was begun a month before the formal contract was signed. The contract which was drawn by defendant names the termini but does not designate the route of the proposed line, and is on a unit basis.

Plaintiff, in determining whether to bid, and in preparing and submitting its bid, relied upon the Chamberlin profile and data submitted by defendant. Defendant in computing the totals of the several bids for comparison used the [319] amounts of the several classes of materials shown on the Chamberlin profile, and furnished plaintiff a large number of blueprints of said profile for use in letting subcontracts and dividing the work between subcontractors. The chief engineer of defendant approved the subcontracts. The field engineer had only the Chamberlin profile when he arrived at the work, began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile.

As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards was moved.

When plaintiff offered the letter of invitation to bid above mentioned, defendant offered the following objection thereto:

> "The defendant objects to the admission of the proposed document. It appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is immaterial and not competent in support of any issue in this case."

When plaintiff offered the Chamberlin profile above mentioned, defendant offered the same objection which it had offered to the letter of invitation above mentioned.

When plaintiff offered the description of the proposed railroad line furnished by defendant to bidders, defendant objected thereto for the same reason stated in objecting to the above mentioned letter of invitation to bid, and the additional reason that

> "It is an attempt to vary the terms of the written contract thereafter made." [320]

In putting in its own case in defense, defendant called as a witness its chief engineer, who testified without objection that the defendant took bids on the Chamberlin profile, that defendant sent out the invitation to bid which had been offered in evidence by plaintiff, and thereafter, and before bids were submitted, defendant sent to plaintiff supplemental letters and information modifying some of the information which accompanied the invitation letter.

The court qualifiedly sustained the objections to plaintiff's offers of the letter of invitation, the

Chamberlin profile and the description of the proposed line; that is, the offers were rejected as representations of the line or grade of the railroad, or the amount or character of the work to be performed under the contract; the court limited said evidence to establishing the general course of the projected road to be through the canyon of Orrfino Creek and rejected it for all other purposes.

Exception to the rejection and limitation of said evidence was taken as follows:

> "Plaintiff excepts to the rejection of the evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor."

Appropriate and timely requests were made by plaintiff for special findings with respect of these original representations.

Assignment of Error No. II.

This specification assigns error in construing plaintiff's pleadings as not presenting the issue of extension of time to complete the construction contract beyond the finishing date named herein (September 1, 1927) and therefore limiting plaintiff's recovery for wrongful deprivation of log haul to logs [321] hauled prior to that date. Plaintiff contends that its complaint avers all facts necessary to plead (1) a waiver of the time limit, and (2) affirmatively pleads an extension of time for completion (Complaint, pars. VI, VII-VIII, IX, XI, XX; reply to par. V).

In September 1925 defendant mailed to plaintiff and other contractors an invitation to bid on construction of a branch line of railroad from Orofino to Headquarters in the state of Idaho. The road was to traverse a rough mountain range. With the invitation went a profile of final location of the line up the canyon of Orofino Creek, a detailed description of the line, and blank forms to be filled in with prices for each unit of work. The information thus submitted showed 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. It warned against cutting into the points of land at stream curvature to avoid bridge construction, as that would produce immense yardage in the steep canyon sides. Plaintiff based its bid on this information; defendant used this information in computing the several bids; the field engineer, and plaintiff, whose bid was accepted, began work on the profile submitted with the invitation.

The invitation to bid required rail to be laid by June 1, 1927, to move logs for the Clearwater Timber Company; the contract fixed the same date, with September 1, 1927, the date for completing the finishing work on the road. The contract was signed by plaintiff November 18, 1925.

As required by the contract, the subcontracts were submitted to and approved by defendant's chief engineer, and the entire work was divided between various subcontractors. The subcontracts

provided for completion of grading at various [322] dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line at Headquarters.

The canyon of Orofino Creek is very rough, and the first 15 miles out of Orofino was important because it would be the means of transporting materials to the canyon. The data accompanying the invitation to bid indicated that 352,425 cubic yards of material would have to be moved in this first sector; final estimate was 635,842 cubic yards. Early in the work the engineer knew the yardage would overrun materially, but did not give definite advice thereof to plaintiff. Instead, the increase was permitted to develop gradually. By June 30, 1926, 355,000 cubic yards of material had been moved on the first sector. The work then continued on this part of the road until the year end, delaying other work.

Many changes were made by the engineer from that indicated on the profile on which bids were based. A tunnel was changed to open cut; 22 new and additional changes in the creek channel were made; 21 bridges eliminated and embankment substituted therefor; work was shifted from one side of the creek to the other; heavy rock work was required where team work was indicated; and a wide grade surface was developed in places by shifting the center line, at one point the width exceeding 100 feet. At some of the steep canyon banks a shift of line as much as one foot could increase the

yardage one thousand per cent. Some of the shifts cut into the canyon bank as much as 55 feet. Whereas the profile submitted with the invitation to bid indicated a job of moving 1,078,000 cubic yards of material, the plaintiff was required to move 2,057,575 cubic yards. [323]

Plaintiff had a feasible plan to complete, and would have completed, the work on time, which was submitted to and approved by defendant before work began. It was based on the work indicated on the profile submitted with the invitation to bid, and contemplated that all grading would be completed by October 1, 1926, most of it during the summer of 1926. By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material. Much of the balance of the total yardage had to be moved in the winter of 1926-1927 under very difficult weather conditions. New channel changes of difficult nature contributed largely to the delay. Some of them were on the first 15 miles, and with the large increase in yardage on that sector delayed the entire work. At request of defendant, plaintiff began work immediately on acceptance of its bid October 15, 1925, and had been pursuing the work on the profile submitted with the invitation for a month before the formal contract was presented and signed.

Defendant directed construction of a number of bridges from rail end. This could not be done until the lower end of the road was completed. Under direction of defendant mud blocks were set in the

bed of Orofino Creek during the summer of 1926; thereafter the work of erecting bents was necessarily performed in the winter of 1926-1927 under conditions of almost indescribable difficulty.

Plaintiff's performance of the contract was delayed in the beginning by failure of the defendant to have trackage facilities at Orofino, and to have camps for its resident engineers. All were constructed by plaintiff; also defendant had not acquired rights of way, and plaintiff had to shift work from place to place during early construction. [324]

In July 1927 defendant ordered work to stop on the lower portion of the road (which defendant took over and completed, wrongfully, we think) but directed plaintiff to "proceed with the completion of the contract work north of Jaype siding". A like notice to stop work on an additional sector above Jaype was given October 7, 1927, and again plaintiff was directed to continue the contract work on the remainder of the line.

The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department of the defendant. The Clearwater Timber Company had cut and banked along the right of way upwards of 20,000,000 f.b.m. of logs prior to July 1927 which had to be moved before another winter to avoid heavy damage. At the contract price of $1.00 per car mile for moving these logs, they were an important commercial haul item, and

plaintiff prepared to haul them and did haul some of them before July 16, 1927. On that date defendant took that portion of the road on which rails were laid, extending from Orofino to Jaype (but on which finishing work was not completed) in order to get this traffic and deprive plaintiff of the profits thereof. With the same motive, additional portions of the road were taken October 12, 1927, and the entire road was taken October 25, 1927. The portions of the road thus taken piecemeal were operated and the logs handled by the construction department of defendant. No portion of the road was turned over to the operating department of defendant until December 31, 1927.

Appropriate and timely requests were made by plaintiff for special findings that performance of the contract was delayed by defendant and the time for completion extended accordingly. [325] These requests were refused. The court properly found plaintiff was entitled to conduct the log haul, that the taking by defendant was wrongful, and that plaintiff was entitled to recover the profits of which it was thereby deprived, but the court further found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927, denying recovery for the period between September 1, 1927, and October 25, 1927, and for the period between October 25, 1927, and December 31, 1927.

Assignment of Error No. III.

This specification assigns error in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul during construction. Plaintiff contends that where a construction contract requires defendant to submit a final estimate on completion and pay the full balance due within thirty days thereafter, this fixes the date from which interest will accrue on money wrongfully withheld; that a wrongful taking of commercial haul from the contractor under misconstruction of the contract can not relieve defendant of the duty to rightly construe and pay under the contract; that where the amount of this commercial haul is known to defendant and the total is merely a matter of computation, the full amount thereof is due at the time named in the contract and interest will accrue thereon from the due date under both the state statute and the federal rule, whether treated as interest or damages for delay, subject to the right in defendant to have the principal amount reduced as of the due date by the amount it would have cost plaintiff to conduct the log haul. [326]

The contract provides that when it shall have been performed, the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance."

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor

* * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor".

Defendant, through its construction department, took the entire road from plaintiff on October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927.

Plaintiff made timely and appropriate request that interest be allowed on the award for the log haul dating from February 1, 1928. This was refused, and the court refused to allow interest on the award prior to judgment.

Asignment of Error No. IV.

This specification assigns error in refusing to allow interest from the date specified in the contract when all moneys should be due and payable to the contractor, the interest being claimed with respect of underpayments for hauling bridge materials, for which work a specific price is named in the contract. Defendant wrongfully construed the contract as calling for a price less than specified. No question of the amount of such hauling is involved. Plaintiff contends (1) that this cause of action is a simple claim for money not paid when due by the contract, and (2) if construed as an action [327] for breach of contract it nevertheless would be for breach of contract to pay money on a specified date; that on either construction interest should be awarded from the due date under both the state statute and the federal rule.

The contract fixes unit prices for all work, among them being

Hauling piles furnished by the company, per lineal foot mile	$ .02
Hauling timber furnished by the company, per thousand feet b.m. mile	.85
Hauling metal fastenings, per ton mile	.65

The court properly found that plaintiff hauled piles furnished by the company, for which, at the stipulated rate, $5,353.78 should have been paid, of which only $660.49 had been paid; timber furnished by the company, for which, at the stipulated rate, $47,253.99 should have been paid, of which only $20,410.52 had been paid; and metal fastenings, for which, at the stipulated rate, $2,563.31 should have been paid, of which only $1,313.62 had been paid; and gave judgment accordingly, but refused to allow interest prior to judgment.

The contract provides that when it shall have been performed the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance."

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor". [328]

Defendant through its construction department took the entire road from plaintiff October 25, 1927.

The road was not accepted and turned over to the operating department of defendant until December 31, 1927.

Timely and appropriate requests were made for interest on the award.

Wherefore appellant prays that the judgment of said District Court of the United States for the District of Oregon be reversed insofar as it refused to award judgment as prayed in plaintiff's complaint.

DeLANCEY C. SMITH
W. LAIR THOMPSON
McCAMANT, THOMPSON, KING & WOOD
Attorneys for Plaintiff

[Endorsed]: Filed May 19, 1937. [329]

And afterwards, to wit, on Wednesday, the 19th day of May, 1937, the same being the 60th judicial day of the Regular March, 1937, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [330]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND

Plaintiff in the above entitled cause having filed in this court a petition for an appeal from the final judgment entered herein dated February 25, 1937,

together with an assignment of errors and prayer for reversal, it is hereby

Ordered that an appeal as prayed for in said petition be and it is hereby allowed; the bond on appeal conditioned as required by law is hereby fixed at the sum of $250.00 and said bond shall operate as a cost bond.

Dated this 19th day of May 1937.

JAMES ALGER FEE
United States District Judge

[Endorsed]: Filed May 19, 1937. [331]

And afterwards, to wit, on the 20th day of May, 1937, there was duly filed in said Court, a bond on appeal of plaintiff in words and figures as follows, to wit: [332]

United States Circuit Court of Appeals
for the Ninth District

TWOHY BROTHERS COMPANY,
a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

BOND ON APPEAL

Know all men by these presents that we, Twohy Brothers Company, a corporation, as principal, and

Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto the appellee, Northern Pacific Railway Company, a corporation, in the full and just sum of two hundred and fifty ($250.00) dollars to be paid to the said appellee, Northern Pacific Railway Company, its certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 20th day of May A. D. 1937.

Whereas in the District Court of the United States for the District of Oregon in an action pending in the said court between Twohy Brothers Company, a corporation, plaintiff, and Northern Pacific Railway Company, a corporation, defendant, a judgment was rendered against the said Northern Pacific Railway Company, and the said Twohy Brothers Company having obtained the allowance of an appeal and filed a copy [333] thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and a citation directed to the said Northern Pacific Railway Company citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California in said circuit on the 15th day of June, 1937.

Now the condition of the above obligation is such that if the said appellant shall prosecute its appeal to effect and answer all costs if he fail to make

the said plea good, then the above obligation to be void, else to remain in full force and virtue.

TWOHY BROTHERS COMPANY
By McCAMANT, THOMPSON, KING & WOOD
Principal.
HARTFORD ACCIDENT AND INDEMNITY COMPANY
By CHARLES S. BARTON
Attorney in Fact Surety
Countersigned:
JEWETT, BARTON, LEAVY AND KERN
By CHARLES S. BARTON
Agents.

The above bond is approved May 20, 1937.

JAMES ALGER FEE
District Court Judge.

[Endorsed]: Filed May 20, 1937. [334]

And afterwards, to wit, on the 21st day of May, 1937, there was duly filed in said Court, a stipulation for record on appeal, in words and figures as follows, to wit: [335]

[Title of Court and Cause.]

STIPULATION FOR PREPARATION OF TRANSCRIPT OF RECORD

Whereas, defendant has filed herein a petition for an appeal and an order has been made allowing defendant an appeal, and citation has been issued thereon, and

Whereas, plaintiff has also filed a petition for an appeal and an order has been made allowing such appeal and a citation has been issued thereon, and plaintiff has thereby become cross-appellant herein;

The parties stipulate that but one transcript of record shall serve both appellant and cross-appellant herein, and but one transcript of record shall be printed, which said transcript of record shall include the documents below listed; and the Clerk of this Court is hereby requested to prepare, certify, and transmit to and file in the United States Circuit Court of Appeals for the Ninth Circuit a transcript of record in this cause to include the following:

1. Complaint
2. Process and Return
3. Answer
4. Reply [336]
5. Stipulation waiving jury trial
6. Defendant's Bill of Exceptions
7. Plaintiff's Bill of Exceptions
8. Findings and Conclusions signed by the Court and filed February 25, 1937
9. Judgment
10. Defendant's Petition for Appeal
11. Defendant's Assignment of Errors
12. Order allowing defendant's appeal and fixing amount of bond
13. Citation on defendant's appeal with admission of service
14. Bond on defendant's appeal
15. Plaintiff's Petition for Appeal

16. Plaintiff's Assignment of Errors
17. Order allowing plaintiff's appeal and fixing amount of bond
18. Citation on plaintiff's appeal with admission of service
19. Bond on plaintiff's appeal
20. This Stipulation for Preparation of Transcript of Record

Dated this 21st day of May, 1937.

DeLANCEY C. SMITH
W. LAIR THOMPSON
McCAMANT, THOMPSON, KING & WOOD
Attorneys for Plaintiff

L. B. DA PONTE
CHARLES A. HART
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant

[Endorsed]: Filed May 21, 1937. [337]

United States of America
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 5 to 337 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein No. L-10552, in which Twohy Brothers Company, a corporation, is plaintiff, and the Northern Pacific Railway Company, a corporation, is defendant, and in which case the

Northern Pacific Railway Company is appellant upon an appeal taken by it, and Twohy Brothers Company is appellee upon said appeal, and in which case the said Twohy Brothers Company is appellant upon an appeal taken by it, and the said Northern Pacific Railway Company is appellee upon said appeal; that said transcript of record has been prepared by me in accordance with a stipulation for transcript filed by appellants and appellees; that I have compared the foregoing transcript with the original record thereof, and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said stipulation as the same appear of record and on file at my office and in my custody.

I futher certify that the appellant, the Northern Pacific Railway Company has paid as its portion of the cost of the foregoing transcript the sum of $42.05 and that appellant, Twohy Brothers Company have paid the balance of the cost of said transcript amount of $12.55.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 8th day of July, 1937.

[Seal] G. H. MARSH,

Clerk [338]

[Endorsed]: No. 8594. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant and Cross-Appellee, vs. Twohy Brothers Company, a corporation, Appellee and Cross-Appellant. Transcript of Record. Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

Filed July 10, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

OPENING BRIEF OF TWOHY BROTHERS COMPANY AS CROSS-APPELLANT

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

DELANCEY C. SMITH,
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American Bank Building,
Portland, Oregon,
Attorneys for Twohy Brothers Company, Appellee and Cross-Appellant.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

Twohy Brothers Company (hereinafter called "plaintiff") is appealing from a final judgment awarding to it what it deems an inadequate recovery in an action against Northern Pacific Railway Company (hereinafter called "defendant"). The litigation arises out of a railroad construction contract.

Plaintiff is a corporation organized under the laws of Oregon (R. 6). Defendant is a corporation organized under the laws of Wisconsin and more than $3,000.00, exclusive of interest and costs is involved, (R. 6). Jurisdiction in the federal court is based on diversity of citizenship (Judicial Code, Sec. 24, U.S. C.A. Title 28, Sec. 41). The case is not of a nature permitting appeal directly to the Supreme Court (Judicial Code, Sec. 128, U.S.C.A. Title 28, Sec. 225).

Testimony was taken before an auditor. Thereafter the case was tried to the court upon the record made before the auditor, a jury being waived in writing (R. 276).

STATEMENT

On September 18, 1925, defendant sent to various contractors, including plaintiff, an invitation to bid on construction of a logging railroad from Orofino to Headquarters, both points in the State of Idaho. Orofino is a station on a Northern Pacific branch line. Headquarters is a point in the mountains 41 miles distant from Orofino. The letter inviting bids stated the purpose of the road to be to penetrate the timber holdings of the Clearwater Timber Company; that the timber company was planning a large mill at Lewiston, which would be finished early in 1927, and that speed in construction was essential—rails to be laid so as to move logs by June 1, 1927, and the job finished by September 1, 1927 (R. 280). It further advised that defendant was forwarding a profile and detailed description of the proposed line made by Engineer Chamberlin; also blank forms for bids on a unit basis. This data, duly received by plaintiff, exhibited a survey up the canyon of Orofino Creek, with all details of a final survey, showing the number and location of changes in the creek channel, the number of bridges to be constructed, amount of material to be moved, etc. (R. 286). Contractor was requested to bid on conducting all commercial hauling over the road while under construction and until the completed road was accepted by the operating department of defendant (R. 306).

Plaintiff's bid was accepted October 15, 1925 (R. 298), but the contract was not executed until November 18, 1925 (A. 277). The contract does not indicate the course of the road nor character or amount of work (R. 52), although it requires the contractor to investigate the proposed line before bidding (R. 71). Essential information appears only on the data submitted with the invitation to bid.

The aggregate bid prices were computed by defendant upon the quantities and work shown on the profile submitted with the invitation to bid, called the Chamberlin profile (R. 289). Before executing the formal contract, construction was begun on the Chamberlin profile by plaintiff and defendant's engineers, under instructions from defendant (R. 289, 298). After a few months defendant began making changes in the work as outlined on the Chamberlin profile, changes that progressively increased the yardage to be moved, eliminated bridges, and greatly increased the number and difficulty of changes in the channel of Orofino Creek (R. 301-303). This slowed up progress of the work and threw a considerable portion of the grading into the second winter (R. 303-304). The contractor's plans, based on data furnished with the invitation to bid, called for completion of grading before the second winter, and the work would have been performed accordingly but for the changes above alluded to (R. 303). By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material (R. 303-304). This was in excess of the total estimate on which plaintiff bid.

The canyon of Orofino Creek is very rugged and steep (R. 302). In it was the most difficult work. Entrance to it with heavy machinery was controlled by the lower or first section of the work out of Orofino (R. 300). Plaintiff sublet the work, the subcontracts being approved by defendant (R. 303). The first 15 miles out of Orofino was let to one subcontractor. Changes on this sector gradually increased the amount of work until it had almost doubled and its completion was delayed many months (R. 300-301). This held up work in the canyon of Orofino Creek until it had to be performed under conditions of almost indescribable difficulty (R. 304-305). Completion of the entire job was delayed from September 1, 1927, to the end of the

year (R. 305, 311). Whereas the amount of yardage represented on the Chamberlin profile was 1,078,000 cubic yards (R. 288), the final estimate showed 2,057,575 cubic yards (R. 289).

Prior to June, 1927, the Clearwater Timber Company cut many million feet of logs and banked them along the railroad. To avoid serious damage these logs had to be moved to the millsite before the following winter. Some of them were moved by plaintiff under the provisions of the contract requiring plaintiff to conduct all commercial business (R. 309). The contract price was $1.00 per car mile (R. 307-308) and the job of moving all the logs banked would be quite profitable to plaintiff and correspondingly expensive to defendant. In the latter part of June, 1927, defendant, through its chief engineer, advised plaintiff that defendant was going to take the log haul—conduct it with defendant's own trains and crews. When plaintiff protested defendant served a notice upon plaintiff to stop work on that portion of the road ready to move logs (Orofino to Jaype), although that portion of the road was not finished (R. 305). Defendant completed the finishing work on the portion indicated (R. 311) and conducted the log haul (R. 309). A like notice was served and like action taken as to an additional portion of the unfinished road when ready for log haul (R. 306).

In each notice to stop work there was specific order to continue the contract as to the remainder of the road (R. 306). The first of these notices was served in July, 1927, prior to the contract finishing date (September 1, 1927). The second notice was served in October, 1927, after the contract finishing date, and directed work to continue under the contract.

The construction contract required plaintiff to haul to the various bridge sites the materials for construct-

ing bridges, culverts, etc (R. 324). These consisted of corrugated pipe, metal fastenings, timbers for stringers, decking, etc. Bid forms designated certain of the hauling as "team haul" and called for separate prices for the various materials. When bids were under consideration the words "team haul" were stricken out by defendant and "hauling" inserted in lieu thereof, with consent of plaintiff. The contract as executed carried out the change and named prices for "hauling" the several materials. Defendant refused to pay these stipulated prices for hauling bridge materials. Plaintiff was paid only the commercial haul prices for this work (R. 325).

The contract provides that when it shall have been performed the chief engineer shall so certify and give a final estimate and statement of the balance unpaid "and the company within thirty days thereafter will pay the full balance" (R. 71).

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor" (R. 70).

After the peacemeal taking of the road while under construction, noted above, defendant on October 25, 1927, took the entire road from plaintiff (R. 167). The completed road was turned over to defendant's operating department December 31, 1927 (R. 168).

The complaint contains in one statement four causes of action:

(1) For extra cost to the contractor caused by the conduct of defendant in changing and increasing the character and amount of work from that submitted in the invitation to bid (R. 5-17).

(2) For the value of the commercial or log haul wrongfully taken from plaintiff by defendant (R. 17-21).

(3) For the unpaid balance due for hauling bridge materials at the prices stipulated in the contract (R. 21-23).

(4) For a balance due on book accounting (R. 23).

The last item (4) was disposed of by stipulation and is not involved in the appeal of either party (R. 171).

Plaintiff relies upon Assignments of Error I (R. 373), II (R. 377), III (R. 383) and IV (R. 384).

CONTENTIONS OF PLAINTIFF

(1) The court ruled that evidence of the data submitted with the invitation to bid would be received only to show the general location of the road but would be rejected as a representation of the amount or character of work (R. 291). It is the position of plaintiff that this evidence was admissible without restriction; that the contract is ambiguous in that it fails to indicate what course the proposed road would pursue —up what mountain canyon it would go—the size of the job or character of work, all of which was essential to a bidder; that the representations of these matters submitted with the invitation to bid became a part of the contract, were submited for that purpose and are essential to an intelligent consideration of the contract.

(2) With respect of the commercial or log haul this appeal presents a question of pleading. The court found plaintiff was entitled to the contract price for the log haul, less the fair cost of conducting it, but thought the issue of the right to these profits beyond the stipulated finishing date (September 1, 1927), was

not presented by the pleadings (R. 321). As we read the court's opinion he thought the claim of extension of time to complete the contract must be pleaded in the reply (R. 339). It is plaintiff's position that the claim of extension of time is properly looked for in the complaint—that a plaintiff claiming beyond the stipulated finishing date must state in the complaint the basis for such claim, and that such issue is presented in the complaint in this cause.

Plaintiff is of the opinion that the trial court intended to and did put the record in such condition that this court can make the proper award on this cause of action. The trial court found that plaintiff was directed to continue the contract after the finishing date, and found the amount of recovery that should be awarded if plaintiff was entitled to the log haul after September 1, 1927 (Finding XV, R. 164; Finding XVIII, R. 169).

(3) In awarding recovery on the cause of action for an unpaid portion of the contract price for hauling bridge materials the court refused to allow interest from the due date fixed by contract (R. 324). The action was for money due in a stipulated amount at a fixed time. The defendant raised an unwarranted controversy over construction of the contract, and denial of interest permits defendant to profit by its own wrong.

It is the position of plaintiff that it was entitled to interest as of right from the due date; that denial of interest for the use of this money denies just compensation which can not be defeated by an unwarranted controversy over construction of the contract.

(4) In awarding plaintiff what it believes an insufficient recovery on the commercial or log haul, the court denied interest on the recovery (R. ~~323~~ 322). It is the position of plaintiff that where a contract provides

that defendant shall adjust all matters and pay all moneys due at a definite time after performance, and where the rate of pay for hauling logs and the amount of logs hauled are definitely known to defendant, the claim for refusing permission to perform is liquidated within the intendment of interest laws and will draw interest from the due date; that this is not changed by the existence of an offset for the cost of the haul—the latter item will reduce the amount of principal but not defeat interest.

(Complete Assignment of Error I is in Appendix, p. 43).

ASSIGNMENT OF ERROR No. I (R. 373)
(Abridged)

Error is assigned in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where a railroad construction contract specifies a unit price and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material as to difficulties and size of job. Defendant, desiring to construct a 41-mile railroad through a rugged mountain range, on September 18, 1925, mailed an invitation to bid to plaintiff at Seattle, Washington, accompanied by profiles showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. Profiles contained all information of a final location: Grade, curvature, amount and classes of material to be moved, and a detailed description of the line. A time limit was named for completion. Construction was begun a month before the formal contract (drawn by defendant) was signed.

The contract names the termini, but does not designate the route of the proposed line and is on a unit basis. Plaintiff in bidding relied upon the said profile and data. Defendant in computing and comparing the several bids used the same data and furnished plaintiff a large number of blue prints of said profile for use in letting subcontracts. Defendant approved the subcontracts. Defendant's field engineer began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile. As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards were moved. The letter of invitation to bid above mentioned, the profile above mentioned, and the description of the proposed railroad line were all objected to as being written before the formal contract. In putting in its defense, defendant covered the evidence objected to. The court limited said evidence to establishing the general course of the projected road to be through the canyon of Orofino Creek and rejected it for all other purposes. Exceptions were reserved and findings requested.

ARGUMENT

This assignment presents an exception material to both the first and second assignments. It weighs importantly in consideration of the claimed right to recover for the commercial or log haul after September 1, 1927, the finishing date named in the contract. The rejection, as representations of the amount and character of work, of the data upon which bids were sub-

mitted, caused the court to deny any recovery on the claim for added cost of construction caused by departures from those representations.

The record is clear that if the job had been in size and character approximately that set forth in the representations upon which plaintiff bid there would have been no heavy construction work in the second winter.

As it developed, the heavy work in the fall of 1926 and the succeeding winter broke the financial back of the contractor. True, persistent under-estimates of monthly work (R. 229) and refusal of the chief engineer to pass on claims as presented (R. 242) added much to plaintiff's hardships. Now, however, we are discussing only the admissibility of evidence of the job upon which plaintiff bid. The work was divided among subcontractors approved by defendant with a view to having all work finished by a stipulated time (R. 303). The first 15 miles out of Orofino, sublet to one subcontractor, controlled entrance to Orofino canyon and extended some distance into that canyon (R. 300). So many changes in the work, as represented at bidding, were made in this first 15 miles, so much increase in yardage developed there, that the entire plan was disrupted and work delayed.

After rejecting the representations on which plaintiff was invited to bid, the court held that the contract, being on a unit basis, or so much per yard of rock removed, or foot of bridge timber placed, was to build a railroad from Orofino to Headquarters, regardless of the amount of work; that changes were immaterial because there was nothing to change from; that because the contract was to build a railroad between termini plaintiff can not complain that the amount of work threw an important part of performance into the second winter under greater hardship and loss to the con-

tractor. True, the court admitted this evidence to determine the general course (the canyon to be penetrated) of the road; but the very profile gave the exact location. It didn't show the general but did show the exact course with grade and curvature and amount of material to be moved (R. 288-289).

We believe the foregoing is a fair statement of the court's reasoning and conclusion. It throws into sharp relief the importance of the rejected evidence.

The contract is too ambiguous for such treatment of evidence. It does not specify the route the road is to follow (R. 52). It does provide that the contractor shall make his own investigation of terrain, classes of material, etc. (R. 71) before bidding, something the contractor could not do without knowing the approximate location of the line. The contract does provide that preliminary estimates, classifications, etc., if shown on the profile, are approximate only, the company reserving the right to increase or decrease them (R. 75) ; yet the only preliminary estimates were those on the Chamberlin profile furnished with the invitation to bid, and that was the only profile. The contract reserves in defendant the right to change the line and grade of the railroad, or the amount of work embraced, or the bridges, leaving to the chief engineer adjustment of compensation (R. 72). Without reference to the profile upon which bids were invited, there is no line, or grade, or bridges, or amount of work—there is nothing to change from. Clearly, defendant, who drew the contract (R.277), knew plaintiff had bid upon the work represented on the Chamberlin profile (R. 285). Just as clearly, plaintiff based its bid, its ability to undertake the job, upon that profile (R. 289). That profile was the information used by defendant in determining which bid seemed to be best—the price varied between bidders, and final results were deter-

mined by computing the bid on the amount of each classification indicated by that profile (R. 289). Construction on the ground began on that profile, both by the defendant's field engineers and plaintiff's subcontractors (R. 289). The size of the job throughout was estimated by that profile and the work divided among subcontractors according to amount and difficulties represented on that profile (R. 289). The time limit was such that careful division of work was of great importance.

We believe there can not be a shadow of doubt that both parties intended the bid to be made and accepted on the data furnished with the invitation—that the data so furnished represented the size and difficulties of the job.

> *Faber v. City of New York* (1918), 222 N.Y. 255, 118 N.E. 609, 610.

If not so intended, why was such information supplied—information that embraced all requirements of a final location? If bidders were expected to make a blind bid for an unknown yardage, with an unknown number of bridges or channel changes, why was any representation made as to these matters?

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d) 1, 2 (9th CCA).

We attach importance to the fact that work was begun on the representations contained in this rejected evidence before the contract was executed. Defendant's desire for speed looms large. It demanded that work begin immediately the bid was accepted (R. 280). Plaintiff complied, and worked for a month under defendant's direction on the Chamberlin profile (R. 298) before formal execution of the contract. The effort of the court should be to determine the intent of

the parties to a contract from the terms of the contract, but where the contract is ambiguous, as this one clearly is, as to the amount and character of work, and the conduct of the parties explains the ambiguity and indicates the understanding, evidence of such conduct is admissible.

Baker County v. Huntington (1905), 46 Or. 275, 278; 79 Pac. 187, 189.
Corvallis & Alsea River R. Co. v. Portland E. & E. Ry. Co. (1917), 84 Or. 524, 534, 536; 163 Pac. 1173, 1177.
Bernitt v. City of Marshfield (1918), 89 Or. 556, 561; 174 Pac. 1153, 1154-1155.
Jaloff v. United Auto Indemnity Exchange (1927), 120 Or. 381, 387; 250 Pac. 717, 720.
Miller v. Robertson (1924), 266 U.S. 243; 69 L. ed. 265, 272.
New York Alaska Gold Dredging Co. v. Walbridge (1935), 76 F. (2d) 655, 662 (9th CCA).
Salt Lake City v. Smith (1900), 104 Fed. 457, 462 (8th CCA).
National Contracting Co. v. Hudson River Water Power Co. (1908), 192 N.Y. 209; 84 N.E. 965, 967.

Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co. (1917), 239 Fed. 603, 607 (7th CCA).
CCA).
(Top page 607).

"Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding, the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, content and extrinsic circumstances, including the prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract."

The contract specified the *manner* of performing and the *price* per unit to be paid for the work upon which plaintiff bid. The work for which plaintiff offered a bid price was that on the profile submitted with the invitation. By that profile changes should be measured.

Spaulding v. Coeur d'Alene Ry. & Nav. Co. (1897), 5 Idaho 528; 51 Pac. 408, 409, 411.
Tribble v. Yakima Valley Transportation Co. (1918), 100 Wash. 589; 171 Pac. 544, 545, 546.
Hayden v. Astoria (1915), 74 Or. 525, 527; 145 Pac. 1072, 1074.
Hayden v. City of Astoria (1917), 84 Or. 205, 212, 164 Pac. 729, 732.

The right to change the plans or amount of work is limited to incidental changes. When the change is material it constitutes a breach of contract.

Montrose Contracting Co. v. County of Westchester (1936), 80 F. (2d) 841, 843 (2nd CCA).
Wood v. City of Fort Wayne (1886), 119 U.S. 312, 321; 30 L. ed. 416, 419.
Hayden v. Astoria (1915), 74 Or. 525, 527; 145 Pac. 1072, 1074.
Salt Lake City v. Smith (1900), 104 Fed. 457, 465 (8th CCA).
Wolff v. McGavock (1871), 29 Wis. 290, 295.

The decision of this court in

Rajotte-Winters, Inc. v. Whitney Co. (1924), 2 F. (2d) 801.

is not in point, is easily distinguishable on the facts, and deals with an entirely different question of law. The attempt there was to prove a secret or side understanding with defendant's engineer that the work could be done in a different *manner* than that expressly stipulated in the formal contract *(2 F. (2d)*

middle second column *p. 802)*, which was complete and clear. Referring to the formal contract, this court said:

> "There was no subject on which it did not purport to speak."

In the case at bar the contract is ambiguous as to the amount, character and location of work. Compliance with its terms would be impossible without reference to the preliminary data upon which bids were invited. That the case is so distinguishable is accentuated by this court's approval in the *Rajotte-Winters* case of *Salt Lake City v. Smith* (1900), 104 Fed. 457, in which such evidence as that here rejected by the trial court was held material and competent in determining the intentions of the parties.

With this evidence in as representations the case should be governed by the principles enunciated by this court in

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d), 1, 2 (9th CCA).

In a decision from the Third Circuit many decisions of the Supreme Court are reviewed and the right of the contractor to rely upon representations upon which bids are invited is upheld. Requirements for inspection can not relieve from the representations.

> *Passaic Valley Sewerage Commissioners v. Holbrook, Cabot & Rollins Corp.* (1925), 6 F. (2d) 721, 724 (3rd CCA) (certiorari denied 269 U.S. 582; 70 L. ed. 423).

(2) Defendant waived any objections to this testimony. After objecting to the letter of defendant's chief engineer, with the accompanying profile, etc., when offered by plaintiff, the defendant in its own direct

case not only explained its version of the invitation to bid and accompanying data, but also added thereto supplementary data sent to bidders before bids were submitted (R. 285).

The Oregon court is firmly committed to the proposition that if defendant in presenting its case enters upon the subject covered by the testimony objected to when offered by plaintiff, the objection is waived and the court will consider all of the testimony.

Kitchin v. Oregon Nursery Co. (1913), 65 Or. 20, 23; 130 Pac. 408, 409.
Cole v. Johnson (1922), 103 Or. 319, 334; 205 Pac. 282, 287.
Warner v. Ellison and White (1929), 129 Or. 197, 202; 276 Pac. 1108, 1110.

Defendant argued to the trial court that this rule of evidence so firmly established in the practice in Oregon should not be applied because the auditor had no authority to pass upon objections. We submit that reference to an auditor to report the issues and facts to the court does not change the rules of evidence. We know of no holding that a reference prescribes different rules of evidence than would obtain in open court. Whether the evidence is offered before the auditor or in open court it was offered at the peril of waiving the objection to like evidence offered by plaintiff. Defendant certainly could not speculate upon the court's ruling, then claim that it was relieved from the rules of evidence if the ruling was found to be adverse. If defendant did not desire to be charged with the waiver, it could have withheld its offer of evidence until time to try the case, and then could have offered the evidence. Instead, it stipulated for a trial to the court without a jury upon the evidence offered before the auditor. We submit that includes waiver, and all legal consequences of the evidence offered.

As to this Assignment of Error, it seems to plaintiff that a most important consideration to any contractor invited to bid upon a job is the size and difficulties of the job. A very difficult job, small in size, could well be financed, but a job of greater proportions and like difficulty might be beyond the ability of a contractor. We can conceive of no reason why a railroad company inviting bids would submit a representation not only of the exact location of the proposed line, but also of the estimated amount of yardage, number of bridges, number of channel changes, etc., except to advise the contractor of the job he was asked to bid upon, and with the expectation that the contractor would bid upon the data so submitted. When we find that the railroad company furnished no other profile of the work, nothing of the nature was attached to the contract, and work was started upon the profile submitted with the invitation to bid, we think the conclusion is inescapable that the information accompanying the invitation to bid not only was a representation but also was a part of the contract itself. Under well established principles of law, increasing the size of a job almost 100 per cent, changing bridges to embankments, cutting streams through mountain points, and laying railroad bed in the old channel, all of which was not indicated when bids were invited, constitute a breach of contract that justifies additional compensation.

(Complete Assignment of Error II is in the Appendix, p. 46.)

ASSIGNMENT OF ERROR No. II (R. 377)
(Abridged)

Error is assigned in ruling that extension of time to complete the construction contract beyond the named finishing date was not in issue, and limiting plaintiff's

recovery for log haul to September 1, 1927. Plaintiff contends its complaint pleads (1) a waiver of the time limit, and (2) extension of time for completion. Defendant invited plaintiff to bid on railroad construction from Orofino to Headquarters, Idaho. The profile upon which plaintiff bid showed a line up the canyon of Orofino Creek with 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. Rail was to be laid by June 1, 1927, to move logs for the Clearwater Timber Company, with September 1, 1927, the finishing date. Subcontracts were submitted to and approved by defendant's chief engineer, providing for completion of grading at various dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line. The canyon of Orofino Creek is very rough, and entrance controlled by the first 15 miles out of Orofino. Profile indicated 352,425 cubic yards of material in this first sector; final estimate was 635,842 cubic yards. The increase developed gradually. June 30, 1926, 355,000 cubic yards had been moved on the first sector. The overrun delayed other work. Many changes from profile representation were made by the engineer, including 22 new changes in the creek channel, 21 bridges eliminated and embankment substituted, work shifted from one side of the creek to the other, heavy rock work required where team work indicated, resulting in much difficult work and a yardage increase from 1,078,000 cubic yards shown on profile to 2,057.575 cubic yards. Plaintiff had a feasible plan (approved by defendant) to complete and would have completed the work on time. In July, 1927, defendant stopped work where rails were laid but directed plaintiff to complete the contract on other portions. Like action was taken on an additional sector

October 7, 1927, after the contract completion date. The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department. Defendant took the portions of the road on which rails were laid in order to get heavy log traffic and deprive plaintiff thereof. The entire road was taken October 25, 1927. Portions thus taken piecemeal were completed and logs handled by defendant's construction department. Road was turned to defendant's operating department December 31, 1927. Appropriate and timely requests were made (and refused) for special findings that time for completion was extended. The court found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927. (R. 321; Finding XVIII.)

ARGUMENT

This assignment presents a single question: Do plaintiff's pleadings claim an extension of time to perform the contract involved either (1) by pleading waiver of time limit, or (2) by affirmatively pleading the extension?

We think a brief reference to the complaint will indicate error of the trial court. We submit the complaint is the pleading in which the issue of extension of time should appear in the first instance. It is not a matter of defense. Plaintiff, suing for recovery beyond the date of final completion fixed in the contract, should lay the basis therefor in the complaint, and if there pleaded the averments need not be repeated in subsequent pleadings.

The complaint (R. 5-24) contains apt averments:

Paragraph VI (R. 8) avers the furnishing by defendant of profile representing the amount and classification of yardage; that plaintiff based its bid thereon; that the yardage defendant required plaintiff to move was just under 100 per cent in excess of the representation; and that the hard rock classification was increased very materially and the common earth decreased materially.

Paragraph VII-VIII (R. 10-12) avers a change in bridge plans while work was in progress; a direction to build bridges from rail end, and a delay in that work by the heavy overrun of yardage in the lower portion of the road, compelling bridge construction in the winter.

Paragraph IX (R. 13) avers that the profiles on which plaintiff bid called for 25 changes in the channel of Orofino Creek involving the excavation of a comparatively small amount of material, the channel changes being light and shallow; that during progress of the work defendant added 38 new channel changes in narrow steep parts of the canyon, increasing the channel excavation requirements over 223 per cent; that much of this work was thrown into the winter months by delays caused by yardage overrun, and performance of the contract thereby delayed.

Paragraph XI (R. 15) avers that plaintiff was prepared to and would have completed the contract well within the time limit specified, but the increases in amount and change in character of work interfered with plaintiff's plan of operation.

Paragraph XX (R. 20) avers that because of the facts alleged earlier in the complaint "defendant per-

mitted plaintiff without objection to extend the time of completion of said railroad to January 1, 1928, at which time plaintiff had fully completed said railroad and the same was accepted by the defendant."

The reply further avers in Paragraph V (R. 149) that plaintiff would have completed the road on time but for the increase in amount and change in character of the work by defendant.

We note that the averment of paragraph XX, *supra,* is not that defendant permitted some part of the work to continue, but is that defendant permitted plaintiff to "extend the time of completion of said railroad." The contract was to build a railroad. We think the averment of extension of time is sufficient.

It developed in proof not only that the averments of change and increase of work and consequent delay were true, but also that in taking from plaintiff portions of the uncompleted road to get the log haul defendant in writing directed plaintiff to continue the contract on the remainder of the road, one of the notices bearing date October 7, 1925, *after the completion date fixed by the contract* (R. 306).

No move was made by defendant to test the sufficiency of these averments of extension of time, nor to limit the reach of the averments in paragraph XX. Under these circumstances the complaint will be liberally construed and all intendments invoked in its behalf.

> *Clarkson v. Wong* (1935), 150 Or. 406, 410; 42 P. (2d) 763, 765.

The contract to build the Orofino-Headquarters railroad is not separable. A part thereof was the right and duty of the contractor to conduct all commercial

hauling until the completed road was accepted by the operating department of defendant (R. 123). We believe it well established that delay caused by defendant does extend time of performance, and permitting a contractor to continue after the stipulated time is an extension of the time of completion.

Marks v. Northern Pacific R. Co. (1896), 76 Fed. 941, 945 (9th CCA).
King Iron Bridge & Mfg. Co. v. St. Louis (1890), 43 Fed. 768, 769 (C.C.Mo.).
Coal & Iron Ry. Co. v. Reherd (1913), 204 Fed. 859, 880 (4th CCA).
A. R. Young Const. Co. v. Road Improvement Dist. No. 2 (1924), 297 Fed. 127, 138 (8th CCA).
Wortman v. Montana Cent. Ry. Co. (1899), 22 Mont. 266; 56 Pac. 316, 324-325.

The written notice without time limit given July 8, 1927, to continue work under the contract, followed by a like notice October 7, 1927, *after the stipulated finishing date,* were formal extensions of time.

The Amoskeag Manufacturing Co. v. United States (1873), 17 Wall. 592; 21 L. ed. 715, 716.

Where the sufficiency of a pleading is challenged for the first time after trial, the court will look at the entire record, including the evidence, in passing on the challenged pleading. Certainly plaintiff attempted to plead an extension of time to perform the contract. Thereafter the case was tried on the theory that the time was extended either to Octobr 25, 1927, when defendant took the entire road, or until December 31, 1927, when the road was delivered to defendant's operating department. Evidence of the log haul was compiled by defendant at request of plaintiff. It was so compiled for two periods, July 16, 1927, to October 25,

1927, and July 16, 1927, to December 31, 1927. So trying the case will aid the pleading, if it needs aider, which we deny.

Rorvik v. North Pacific Lbr. Co. (1921), 99 Or. 58, 71-72; 190 Pac. 331, 334-335.
State ex rel Carson v. Kozer (1922), 105 Or. 509, 520; 210 Pac. 172, 175.
Boyle v. Coast Improvement Co. (1915), 27 Cal. App. 714; 151 Pac. 25, 27.
Lamb v. Ulrich (1923), 94 Okla. 240; 221 Pac. 741, 743.
Sherwood v. City of Sioux Falls (1898), 10 S. Dak. 405; 73 N.W. 913, 914.

Even though the complaint should be held defective as a pleading of extension of time, and the court should decline to give weight to trial of the case without challenging the pleading, yet the complaint pleads waiver by defendant of the time limit for completion. It sets up the facts that constitute waiver, and that is all that is necessary.

Jaloff v. United Auto Indemnity Exchange (1927), 121 Or. 187, 195; 253 Pac. 883, 886.
Watson v. Pacific Mutual Life Ins. Co. (1933), 144 Or. 413, 415; 21 P. (2d) 201, 202.

We submit that plaintiff's pleadings do present the issue of extension of time, and that it was error to rule otherwise.

We believe the findings are sufficient to permit this court to enter judgment for the increased amount that should be awarded for the log haul, at least up to the time the entire road was taken from plaintiff October 25, 1927. We think plaintiff was entitled to conduct the log haul until the road was turned over to the operating department of the defendant as provided by the contract. However, the finding of the court (Finding XV, R. 164) is that the plaintiff had the right to conduct the log haul while the line was under construc-

tion; that on October 7, 1927, in making another piecemeal taking of a portion of the road, there was a direction from defendant to plaintiff to continue on the contract (R. 166), and that the entire road was taken October 25, 1927 (R. 167); that no portion of the road had been completed when taken; that plaintiff was progressing satisfactorily with its contract and the road was taken for the purpose of gaining the log haul for defendant and depriving plaintiff thereof. The court further finds (Finding XVII, R. 169) the amount of damage sustained by plaintiff because of this taking, if plaintiff's pleadings are sufficient to present the issue, to-wit, the contract price for the amount of logs hauled to October 25, 1927, $304,301.08, and the fair cost of conducting this transportation by plaintiff would have been $72,209.95, leaving a net sum due plaintiff on this item, up to October 25, 1927, of $232,091.13, for which judgment should have been passed instead of $125,000, as found by the court.

In view of the specific direction to continue work after the stipulated finishing date, which direction the court finds was given by defendant to plaintiff, we think all findings are made that are necessary to enable this court to enter the judgment that should be entered, and that on this department of the case this court is fully authorized and empowered to direct the judgment that should be entered without sending it back for re-trial.

Massachuetts Bonding & Ins. Co. v. Santee (1933), 62 F. (2d) 724 (9th CCA).

Howbert v. Penrose (1930), 38 F. (2d) 577 (10th CCA).

City of Fort Scott v. Hickman (1884), 112 U.S. 150; 28 L. ed. 636, 641.

United States v. Stark (1929), 32 F. (2d) 453 (6th CCA).

To avoid repeating argument, and because it seems to be the more logical method of presenting the next two assignments, we argue Assignment of Error No. IV in advance of argument on Assignment of Error No. III.

ASSIGNMENT OF ERROR No. IV (R. 384)

This specification assigns error in refusing to allow interest from the date specified in the contract when all moneys should be due and payable to the contractor, the interest being claimed with respect of underpayments for hauling bridge materials, for which work a specific price is named in the contract. Defendant wrongfully construed the contract as calling for a price less than specified. No question of the amount of such hauling is involved. Plaintiff contends (1) that this cause of action is a simple claim for money not paid when due by the contract, and (2) if construed as an action for breach of contract it nevertheless would be for breach of contract to pay money on a specified date; that on either construction interest should be awarded from the due date under both the state statute and the federal rule. The contract fixes unit prices for all work, among them being:

Hauling piles furnished by the company, per lineal foot mile	$ .02
Hauling timber furnished by the company, per thousand feet b.m. mile	.85
Hauling metal fastenings, per tone mile	.65

The court properly found that plaintiff hauled piles furnished by the company, for which, at the stipulated rate, $5,353.78 should have been paid, of which only $660.49 had been paid; timber furnished by the company, for which, at the stipulated rate, $47,253.99 should have been paid, of which only $20,410.52 had

been paid; and metal fastenings, for which, at the stipulated rate, $2,563.31 should have been paid, of which only $1,313.62 had been paid; and gave judgment accordingly, but refused to allow interest prior to judgment. The contract provides that when it shall have been performed the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance." The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor." Defendant through its construction department took the entire road from plaintiff October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927. Timely and appropriate requests were made for interest on the award.

ARGUMENT

Assignments III and IV both deal with the action of the court in declining to allow interest upon the recovery which was awarded on the cause of action for the contract price which would have accrued to plaintiff for hauling logs (commercial haul) and for refusing to pay plaintiff the contract price for hauling bridge materials (material haul). We will discuss the material haul first.

The court rested its denial of interest on the sole proposition that interest may not be allowed if the action is for "breach of contract." Apparently no distinction was made between breach of contract to pay money definite in amount and with a definite due date, and breach where the amount is not ascertained or

ascertainable. We submit that it is unsafe to rely upon such generalities in determining whether interest recovery should be awarded.

The complaint in one statement pleads four causes of action, (1) for money due for work different than contemplated by the parties, (2) for money due for the log (commercial) haul, the exact amount of which was known to defendant, but of which defendant had wrongfully deprived plaintiff, (3) for money due for hauling bridge materials at the price specified in the contract, defendant having wrongfully paid at a lower price, and (4) for a balance due on book accounting.

The joinder of these several causes of action in one statement was not attacked by defendant. This waives the objection.

State v. Montag Co. (1930), 132 Or. 587, 593; 286 Pac. 995, 997.
1 Bancroft's Code Pleading, Sec. 116, p. 224.
Phillips on Code Pleading, Sec. 287, p. 270.

The statement of several causes of action together will not permit one to dominate the others or to classify the several causes, but each will be treated as though separately stated.

Metcalf Co. v. Gilbert (1911), 19 Wyo. 331; 116 Pac. 1017, 1021.
Smith v. Jones (1902), 16 S. Dak. 337; 92 N.W. 1084, 1085.
Beers v. Kuehn (1893), 84 Wis. 33; 54 N.W. 109.

Metcalf Co. v. Gilbert (1911), 19 Wyo. 331; 116 Pac. 1017 (bottom first column, p. 1021):

"The form of the petition not having been properly challenged, it is to be construed the same as though there were separate statements of two causes of action, one upon an express contract for the agreed price, and one upon implied contract for the reasonable value of the services rendered."

Treating the two haul claims separately, it readily appears that the claim for underpayment for hauling bridge materials (R. 21; Complaint pars. XXII-XXVII) is a simple complaint for money past due,—breach of contract to pay money at a fixed time and in a certain amount. The amount of material hauled by plaintiff under the contract was not in issue,—was always known to defendant. The rate of pay was definitely fixed in the contract (R. 59). Defendant refused to pay the contract rate. Under the contract, payments should have been made monthly (R. 67), but in any event within thirty days after the road was completed (R. 71). With that record, that promise to pay at a definite time, is plaintiff entitled to interest on the amount due from the due date? Can plaintiff be deprived of this, without which it will not have been compensated, upon any such general proposition as that interest will not be allowed if the action is for breach of contract?

Oregon Code Annotated 1930, Section 57-1201, provides (setting forth the Oregon Statute as amended in 1917):

> "The rate of interest in this state shall be six per centum per annum and no more, and shall be payable in the following cases, to-wit:
>
> "1. On all moneys after the same becomes due; provided, that open accounts shall bear interest from the date of the last item thereof."

* * *

Prior to the amendment of this section in 1917, decisions of the Oregon court were not uniform. In *Sargent v. American Bank and Trust Co.* (1916), 80 Or. 16; 154 Pac. 759; 156 Pac. 431, the presence of a semicolon was held to prohibit interest on moneys due until the claim was in judgment.

In 1917 this section was amended to provide for interest on moneys after the same became due. Thereafter interest has been awarded on recoveries from the time money became due before judgment, and earlier decisions were expressly thrown into the discard.

City of Portland v. State Bank of Portland (1923), 107 Or. 267, 278; 214 Pac. 813, 816.

As amended, the Oregon statute has received the same construction this court gives to a similar act of Congress governing interest in Alaska. In

New York Alaska Gold Dredging Co. v. Walbridge (1930), 38 F. (2d) 199, 204 (9th CCA)

this court allowed interest in a case involving a claim for money due under a service contract as to the terms and interpretation of which the parties were in disagreement. The issue was about the same as in the case at bar.

Such has been the ruling of the Oregon Supreme Court in cases since the amendment of 1917.

Watson v. Pacific Mutual Life Ins. Co. (1933), 144 Or. 413, 420; 21 P. (2d) 201, 202.

Defendant refused to pay full disability benefits provided in an insurance policy, presenting an issue of fact as to the extent of disability. Until this issue was determined, the amount was uncertain. It was a breach of contract to pay money. Interest was allowed on the recovery when the amount that should have been paid had been ascertained. (144 Or. middle p. 420.)

"As to the allowance of interest upon the unpaid benefits from the date they were due, section 57-1201, Oregon Code, 1930, provides that interest shall be payable on all moneys after the same becomes

due. The finding of the jury determined that the installments were due and hence interest accrued thereupon."

Hill v. Wilson (1928), 123 Or. 193; 261 Pac. 422.

The facts in this case are stated in 108 Or. 621; 216 Pac. 751. Hill performed personal services for Wilson as a loan broker. The amount of commissions was for computation. Applying the amended Oregon interest statute, the court said:

(123 Or. bottom p. 199).

"The pay for said services was due when the services were rendered. Money bears interest in this state from the time it is due."

Even where the amount is in controversy, if the contract requires payment at a stated time, interest will be allowed from due date on the sum the court or jury finds should have been paid.

North Pacific Const. Co. v. Wallowa County (1926), 119 Or. 565, 572; 249 Pac. 1100, 1102-1103.

This case involved a road construction contract which contained the usual provision making final estimate and decision of the chief engineer binding and conclusive. The final estimate was assailed by the contractor. The contract required the amount earned to be paid within 35 days after final estimate. The court found the contractor had been underpaid upwards of $20,000, that the proper amount should have been paid on the due date, and awarded interest. (119 Or. top p. 572.)

"As we have determined the proper amount to have been awarded to the plaintiff at that time was $21,718.52; it became the duty of the defendant to

pay that amount to the plaintiff within thirty-five days thereafter, or on August 10, 1921. Under the provisions of Section 7988, Oregon Laws, interest at the rate of 6 per centum per annum 'shall be payable in the following cases, to-wit:

"'1. On all moneys after the same became due; provided, that open accounts shall bear interest from the date of the last item thereof.'

"The plaintiff is entitled to interest on the balance found due as stated from that date."

Clearly, under the decisions of the Oregon Supreme Court rendered since the amendment of 1917, and under the decisions of this court construing a similar interest statute for Alaska, the right of recovery of interest is not governed by the form of action. If the money fell due before suit just compensation requires that interest be awarded for use of the money from the due date. The right to interest is not defeated by a denial of the claim even if made in good faith.

Gellert v. Bank of California (1923), 107 Or. 162, 178; 214 Pac. 377, 383.

This was an action to recover money represented by drafts purchased from the bank with intent to make a gift thereof to certain persons in New York. The purchaser died without having made the gift. Her executor sued the issuing bank for the amount represented by the drafts. The Oregon court held (107 Or. 175-176) that the bank could offset against recovery the expense it had been to in transmitting the funds to its New York correspondent and obtaining return thereof, thus ruling that an offset will not prevent allowance of interest on the net amount due because interest was allowed on the amount found to be due from

demand. The court further rejected the claim that a good faith defense will defeat the interest award. (107 Or. middle p. 178).

> "The contention is that when the right to recover money is in good faith denied, interest will not be allowed on the demand prior to liquidation by judgment. The following precedents are relied upon to support this contention: *Baker County v. Huntington*, 48 Or. 593, 603 (87 Pac. 1036; 89 Pac. 144); *Holtz v. Olds*, 84 Or. 567, 581 (164 Pac. 583); *City of Seaside v. Oregon S. & C. Co.*, 87 Or. 624, 634 (171 Pac. 396). Each of the precedents relied upon by the appellant was based upon the statute as it existed prior to the enactment of Chapter 358, Laws of 1917, amending Section 6028, L.O.L. The amount for which the plaintiff sued was a definite and certain sum. The plaintiff was entitled to recover either the whole amount of each draft or nothing. The amount became due before judgment. By the plain terms of Section 7988, Or. L., as it now reads after amendment, interest 'shall be payable * * * on all moneys after the same become due.' Interest was properly included in the judgment."

In its most recent decision on the subject the Oregon court allows interest on a judgment for conversion and on an accounting, overruling earlier decisions on that subject.

> *Abrams v. Rushlight* (July 7, 1937), Or. Adv. Sheets, Vol. 24, No. 22.

Under the law of the forum, interest should have been allowed on the award under this item of the complaint. It was not a matter of discretion. Substantial justice required the allowance.

> *Miller v. Robertson* (1924), 266 U.S. 243; 69 L. ed. 265, 272.

Chanslor-Canfield Midway Oil Co. v. United States (1920), 266 Fed. 145, 151 (9th CCA).
Montana Mining Co. v. St. Louis Min. & Mill. Co. (1910), 183 Fed. 51, 70 (9th CCA).

Prior to the amendment of the Oregon statute in 1917 there were a number of decisions ruling that interest could not be allowed in actions for breach of contract; there were decisions ruling that interest could not be allowed on a claim for conversion; and there were decisions ruling that interest could not be allowed if there was a good faith denial of the claim. We think, however, under the Oregon cases decided since the statutory amendment of 1917 interest should be allowed on claims for breach of contract such as here presented, where the contract fixes a specific price and due date. If there be doubt as to this contention, if the position of the Oregon Supreme Court may be said to be in a state of flux or uncertainty, the federal court will follow its own rule, which allows interest where required to do substantial justice.

Concordia Ins. Co. v. School District (1931), 282 U.S. 545; 75 L. ed. 528, 543.

If we eliminate cases in which there is no definite amount fixed in the contract, ascertained or ascertainable, and no definite due date, we think there can be no question but that the Oregon court has construed its amended statute to conform to the general rule that interest should be allowed in cases where the amount is ascertainable by computation and the due date is fixed.

ASSIGNMENT OF ERROR No. III (R. 383)

This specification assigns error in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul

during construction. Plaintiff contends that where a construction contract requires defendant to submit a final estimate on completion and pay the full balance due within thirty days thereafter, this fixes the date from which interest will accrue on money wrongfully withheld; that a wrongful taking of commercial haul from the contractor under misconstruction of the contract can not relieve defendant of the duty to rightly construe and pay under the contract; that where the amount of this commercial haul is known to defendant and the total is merely a matter of computation, the full amount thereof is due at the time named in the contract and interest will accrue thereon from the due date under both the state statute and the federal rule, whether treated as interest or damages for delay, subject to the right in defendant to have the principal amount reduced as of the due date by the amount it would have cost plaintiff to conduct the log haul. The contract provides that when it shall have been performed, the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance." The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor." Defendant, through its construction department, took the entire road from plaintiff on October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927. Plaintiff made timely and appropriate request that interest be allowed on the award for the log haul dating from February 1, 1928. This was refused, and the court refused to allow interest on the award prior to judgment.

ARGUMENT

Plaintiff was entitled to conduct the log haul as a part of the commercial business included in its contract (R. 168; Finding XV). With advices in the invitation to bid that the road was to be in shape to move logs for a period of three months before the completion date of the contract, and that the Clearwater Timber Company would have logs to move, this item would form an important consideration to a contractor preparing his bid. It did in this case, and a price of $1.00 per car mile was stipulated. After plaintiff had hauled the first carloads of these logs defendant wrongfully took from plaintiff the portion of the road upon which rail had been laid in order that defendant might conduct the log haul, and deprived plaintiff of the profits thereof. The amount of commercial business thus wrongfully conducted by defendant was known and not questioned at trial. The rate of pay therefor was definite. The amount due monthly depended only on computation. Under the contract all was due in any event February 1, 1928. Had plaintiff been permitted to conduct this haul the cost thereof would have been a part of the current expense under the contract. Can the right of defendant to have this cost deducted from the agreed rate of compensation defeat plaintiff's right to interest from due date on the aggregate compensation it lost? We think such an offset or counter-claim merely reduces the amount but does not change the right.

We will not again cite cases heretofore cited (this brief, p. 28-33) to the point that interest accrues on money due whatever the form of action. We think the claim for profits on the commercial haul was a liquidated claim within the rule respecting interest. The two tests are stated to be (1) is the exact amount as-

certained or *ascertainable* by computation? and (2) can the time from which interest is to run be ascertained? (*1 Sedgwick on Damages* (9th ed.), Sec. 300, p. 571.)

As to (1) the amount of compensation is definitely fixed in the contract and defendant had in its possession a record of the definite quantities of logs hauled. As to (2) the contract definitely fixes the time when payment should have been made.

1 Sedgwick on Damages (9th ed.), Sec. 314a, p. 622.

> "Where by the contract it was the defendant's duty at a certain time to liquidate the debt, and he fails to do so, interest can without doubt be recovered on the balance found due from that time."

1 Sedgwick on Damages (9th ed.), Sec. 314b, p. 624.

> "If one claim is liquidated in amount, interest will run on that claim though the counter-claim is unliquidated."

At Section 308a, page 597, the same author says that for work and labor at an agreed price payable at a fixed time, interest will be added. Sedgwick in his text is but announcing the general rule on the subject.

8 R.C.L., p. 534.
17 C.J. 817.
Miller v. Robertson (1924), 266 U.S. 243; 69 L. ed. 265, 272.
Van Rensselaer v. Jewett (1849), 2 N.Y. 135.

Van Rensselaer v. Jewett (1849), 2 N.Y. 135.

This is a leading case. It holds that in an action for breach of contract interest will be allowed from due date if the amount can be ascertained by computation even though values of goods that fluctuate in value must be determined by a jury. It involved a

contract to pay rental in commodities and services. Interest was allowed. After reviewing earlier cases, the court said:

(2 N.Y. p. 140).

"The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money."

8 R.C.L. p. 534:

"For the reason that claims founded on breach of contract are more readily ascertainable in their amount, or capable of being liquidated by computation, than are those arising out of torts, the rule is that interest as damages is generally allowed in actions for breach of contract, provided, of course, the claim has other essential elements of certainty,

as, for example, that it is payable on a certain day and there is a default in payment or performance, or that the liability is fixed by a demand."

Allowance of interest as damages for breach of contract in order to award full compensation, was recognized as proper in Oregon at an early date.

Livesley v. Johnston (1906), 48 Or. 40, 54; 84 Pac. 1044, 1049.

Too much emphasis in some of the early decisions has been placed on the term "liqudated." More recent decisions of courts generally approach the rule of the federal courts to allow interest when substantial justice requires it.

Faber v. City of New York (1918), 222 N.Y. 255; 118 N.E 609, 610:

(118 N.E. bottom second column p. 610.)

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values, or other generally recognized standards?"

As noted in this brief (p. 31-32) the Oregon Court in *Gellert v. Bank of California* ruled that the fact that defendant may have an offset or counter-claim of ex-

pense incurred will not prevent the allowance of interest on the net amount that should have been paid. This is the general rule.

33 C.J. 210.
New York Alaska Gold Dredging Co. v. Walbridge (1935), 76 F. (2d) 655, 657, 659 (9th CCA).

It is stated in the *American Law Institute Restatement of the Law of Contracts,* as follows:

"Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled." *Sec. 337.*

Under this section the author of the Restatement gives many illustrations applicable to the situation in the case at bar, particularly note (h).

Failure to pay based on misconstruction of contract will carry interest.

Hind v. Uchida Trading Co. (1922), 55 Cal. App. 260; 203 Pac. 1028, 1029 (rehearing denied by Sup. Ct.).

Defendant had the opportunity to save interest by tender, saving to plaintiff the right to sue for any amount in excess of the tender. Instead of doing this, the defendant denied all liability and retained use of the money. Defendant can not complain in good conscience if it is required to pay the rent.

Prager v. New Jersey Fidelity & Plate Glass Ins. Co. (1927), 245 N.Y. 1; 156 N.E. 76, 77.

(156 N.E. bottom second column p. 77.)

"The defendant could have limited its liability for interest by a common-law tender, or by a payment on account without prejudice to the plaintiff's right to recover the excess. If it chose to keep the money, it should pay for what it kept. * * * More and more the courts are coming over to the view that, in actions on implied contracts to recover for services or property, interest is a concomitant very nearly automatic, and this though the value has been honestly disputed. Interest is now held to be an incident to 'just compensation,' where property has been taken in the exercise of the power of the government."

Even under statutes providing for summary judgment in claims on "liquidated demands" interest will be allowed on the contract price where the contractor is not permitted to perform or where reasonable value is to be ascertained.

Weisberg v. Art Work Shop (1929), 235 N.Y.S. 8; 226 App. Div. 532 (affirmed 252 N.Y. 572; 170 N.E. 147).

Grossman v. Brick (1927), 5 N.J. Misc. Rep. 1016; 139 Atl. 490.

Henry W. Cooke Co. v. Sheldon (1933), 53 R.I. 101; 164 Atl. 327.

The amount of the claim for this commercial haul was known to defendant at all times. The contract provided a specific compensation per car mile. The record of car miles and amount of commercial freight was kept by the defendant. From its records, the evidence on this subject was obtained. The total claim was merely a matter of computation. The final and ulti-

mate due date is fixed in the contract as 30 days after the work is completed. The work was completed and the road delivered to the operating department of the defendant December 31, 1927. While this money should have been included in the monthly estimates and probably would have been included and payments made monthly if plaintiff had not been deprived of the haul, the latest date at which full compensation was due was February 1, 1928. Had plaintiff been permitted to perform its contract in this respect, the cost would have been met by plaintiff as the contract was performed, and the only figure that would concern the defendant would have been the contract rate for hauling. Defendant alone created the situation that exists. It can not, through its own wrong, keep the use of money due plaintiff and refuse interest thereon. Its only right is to have the amount due reduced by the determined cost of the haul. Having denied the claim intoto, and retained use of the money, defendant should pay the rent.

CONCLUSION

Plaintiff cross-appellant submits that the court erred:

(1) In limiting evidence of preliminary negotiations so as to exclude such evidence as representations of the amount and character of the work upon which plaintiff bid.

(2) In ruling that plaintiff's pleadings do not tender an issue as to the right to recover for the log haul beyond September 1, 1927 (in respect of this item plaintiff submits that the court's findings are such as to permit this court to enter a proper judgment).

(3) In denying interest on the award for the material haul from the final due date fixed in the con-

tract, and that this court should award interest on the aggregate sums making up the material haul claim ($32,786.45) at the rate of six per cent per annum from February 1, 1928.

(4) In denying interest on the commercial haul claim; that the award on this cause of action should be increased to at least $232,091.13, and interest should be awarded on this amount from February 1, 1928.

Respectfully submitted,

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APPENDIX

ASSIGNMENT OF ERROR No. I

This specification assigns error in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where the contract specifies a price per unit, or yard, of work, for a proposed railroad through the mountains, and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material and constitutes a representation upon which bidders must rely as to difficulties and size of job, and in determining whether bidder can undertake it. The only profile or description of work was that accompanying the invitation to bid. In the year 1925 Northern Pacific Railway Company undertook the construction of a branch line of railroad into the timber of the Clearwater Timber Company, the road to extend from Orofino on the main line of the railroad company to Headquarters, a distance of 41 miles, through a rough, rugged mountain range.

Defendant let bids on a survey up the canyon of Orofino Creek made for the timber company by one Chamberlin, admittedly a competent locating engineer. On September 18, 1925, an invitation to bid was mailed by defendant in St. Paul, Minnesota, to plaintiff at Seattle, Washington, accompanied by profiles of the Chamberlin survey, showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. The profile contained all of the information of a final location, showing grade, curvature, and amount and classes of

material to be moved; also with the invitation went a detailed description of the line shown on the profiles. Blank forms for filling in the bidder's price for all work on a unit basis accompanied the invitation, which advised bidders that there was a time limit for the work as the road was required to be ready to move logs for the Clearwater Timber Company by June 1, 1927. Plaintiff's bid was accepted and construction of the railroad was begun a month before the formal contract was signed. The contract, which was drawn by defendant, names the termini but does not designate the route of the proposed line, and is on a unit basis.

Plaintiff, in determining whether to bid, and in preparing and submitting its bid, relied upon the Chamberlin profile and data submitted by defendant. Defendant in computing the totals of the several bids for comparison used the amounts of the several classes of material shown on the Chamberlin profile, and furnished plaintiff a large number of blue prints of said profile for use in letting subcontracts and dividing the work between subcontractors. The chief engineer of defendant approved the subcontracts. The field engineer had only the Chamberlin profile when he arrived at the work, began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile.

As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards were moved.

When plaintiff offered the letter of invitation to bid above mentioned, defendant offered the following objection thereto:

> "The defendant objects to the admission of the proposed document. It appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is immaterial and not competent in support of any issue in this case."

When plaintiff offered the Chamberlin profile above mentioned, defendant offered the same objection which it had offered to the letter of invitation above mentioned.

When plaintiff offered the description of the proposed railroad line furnished by defendant to bidders, defendant objected thereto for the same reason stated in objecting to the above mentioned letter of invitation to bid, and the additional reason that:

> "It is an attempt to vary the terms of the written contract thereafter made."

In putting in its own case in defense, defendant called as a witness its chief engineer, who testified without objection that the defendant took bids on the Chamberlin profile, that defendant sent out the invitation to bid which had been offered in evidence by plaintiff, and thereafter, and before bids were submitted, defendant sent to plaintiff supplemental letters and information modifying some of the information which accompanied the invitation letter.

The court qualifiedly sustained the objections to plaintiff's offers of the letter of invitation, the Chamberlin profile and the description of the proposed line;

that is, the offers were rejected as representations of the line or grade of the railroad, or the amount or character of the work to be performed under the contract; the court limited said evidence to establishing the general course of the projected road to be through the canyon of Orofino Creek and rejected it for all other purposes.

Exception to the rejection and limitation of said evidence was taken as follows:

> "Plaintiff excepts to the rejection of the evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor."

Appropriate and timely requests were made by plaintiff for special findings with respect of these original representations.

ASSIGNMENT OF ERROR No. II

This specification assigns error in construing plaintiff's pleadings as not presenting the issue of extension of time to complete the construction contract beyond the finishing date named therein (September 1, 1927), and therefore limiting plaintiff's recovery for wrongful deprivation of log haul to logs hauled prior to that date. Plaintiff contends that its complaint avers all facts necessary to plead (1) a waiver of the time limit, and (2) affirmatively pleads an extension of time for completion (Complaint, pars. VI, VII-VIII, IX, XI, XX; reply par. V).

In September, 1925, defendant mailed to plaintiff and other contractors an invitation to bid on construction of a branch line of railroad from Orofino to Headquarters in the state of Idaho. The road was to tra-

verse a rough mountain range. With the invitation went a profile of final location of the line up the canyon of Orofino Creek, a detailed description of the line, and blank forms to be filled in with prices for each unit of work. The information thus submitted showed 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. It warned against cutting into the points of land at stream curvature to avoid bridge construction, as that would produce immense yardage in the steep canyon sides. Plaintiff based its bid on this information; defendant used this information in computing the several bids; the field engineer, and plaintiff, whose bid was accepted, began work on the profile submitted with the invitation.

The invitation to bid required rail to be laid by June 1, 1927, to move logs for the Clearwater Timber Company; the contract fixed the same date, with September 1, 1927, the date for completing the finishing work on the road. The contract was signed by plaintiff November 18, 1925.

As required by the contract, the subcontracts were submitted to and approved by defendant's chief engineer, and the entire work was divided between various subcontractors. The subcontracts provided for completion of grading at various dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line at Headquarters.

The canyon of Orofino Creek is very rough, and the first 15 miles out of Orofino was important because it would be the means of transporting materials to the canyon. The data accompanying the invitation to bid indicated that 352,425 cubic yards of material would have to be moved in this first sector; final estimate

was 635,842 cubic yards. Early in the work the engineer knew the yardage would overrun materially, but did not give definite advice thereof to plaintiff. Instead, the increase was permitted to develop gradually. By June 30, 1926, 355,000 cubic yards of material had been moved on the first sector. The work then continued on this part of the road until the year end, delaying other work.

Many changes were made by the engineer from that indicated on the profile on which bids were based. A tunnel was changed to open cut; 22 new and additional changes in the creek channel were made; 21 bridges eliminated and embankment substituted therefor; work was shifted from one side of the creek to the other; heavy rock work was required where team work was indicated; and a wide grade surface was developed in places by shifting the center line, at one point the width exceeding 100 feet. At some of the steep canyon banks a shift of line as much as one foot could increase the yardage one thousand per cent. Some of the shifts cut into the canyon bank as much as 55 feet. Whereas the profile submitted with the invitation to bid indicated a job of moving 1,078,000 cubic yards of material, the plaintiff was required to move 2,057,575 cubic yards.

Plaintiff had a feasible plan to complete, and would have completed, the work on time, which was submitted to and approved by defendant before work began. It was based on the work indicated on the profile submitted with the invitation to bid, and contemplated that all grading would be completed by October 1, 1926, most of it during the summer of 1926. By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material. Much of the balance of the total yardage had to be moved in the winter of 1926-1927 under very

difficult weather conditions. New channel changes of difficult nature contributed largely to the delay. Some of them were on the first 15 miles, and with the large increase in yardage on that sector delayed the entire work. At request of defendant, plaintiff began work immediately on acceptance of its bid October 15, 1925, and had been pursuing the work on the profile submitted with the invitation for a month before the formal contract was presented and signed.

Defendant directed construction of a number of bridges from rail end. This could not be done until the lower end of the road was completed. Under direction of defendant mud blocks were set in the bed of Orofino Creek during the summer of 1926; thereafter the work of erecting bents was necessarily performed in the winter of 1926-1927 under conditions of almost indescribable difficulty.

Plaintiff's performance of the contract was delayed in the beginning by failure of the defendant to have trackage facilities at Orofino, and to have camps for its resident engineers. All were constructed by plaintiff; also defendant had not acquired rights of way, and plaintiff had to shift work from place to place during early construction.

In July, 1927, defendant ordered work to stop on the lower portion of the road (which defendant took over and completed, wrongfully, we think) but directed plaintiff to "proceed with the completion of the contract work north of Jaype siding." A like notice to stop work on an additional sector above Jaype was given October 7, 1927, and again plaintiff was directed to continue the contract work on the remainder of the line. The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department of the defendant. The Clearwater Timber Company had

cut and banked along the right of way upwards of 20,000,000 f.b.m. of logs prior to July, 1927, which had to be moved before another winter to avoid heavy damage. At the contract price of $1.00 per car mile for moving these logs, they were an important commercial haul item, and plaintiff prepared to haul them and did haul some of them before July 16, 1927. On that date defendant took that portion of the road on which rails were laid, extending from Orofino to Jaype (but on which finishing work was not completed) in order to get this traffic and deprive plaintiff of the profits thereof. With the same motive, additional portions of the road were taken October 12, 1927, and the entire road was taken October 25, 1927. The portions of the road thus taken piecemeal were operated and the logs handled by the construction department of defendant. No portion of the road was turned over to the operating department of defendant until December 31, 1927.

Appropriate and timely requests were made by plaintiff for special findings that performance of the contract was delayed by defendant and the time for completion extended accordingly. These requests were refused. The court properly found plaintiff was entitled to conduct the log haul, that the taking by defendant was wrongful, and that plaintiff was entitled to recover the profits of which it was thereby deprived, but the court further found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927, denying recovery for the period between September 1, 1927, and October 25, 1927, and for the period between October 25, 1927, and December 31, 1927.

No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation
Appellant
vs.
TWOHY BROTHERS COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANT

CHARLES A. HART,
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BRIEF OF APPELLANT

JURISDICTION

This is a suit of a civil nature, at common law, between citizens of different states. Appellee's complaint alleged (R. p. 6), and appellant's answer admitted (R. p. 27), that appellee is a corporation organized and existing under the laws of the State of Oregon, and is a citizen and resident of that state, and that appellant is a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of that state. The complaint further al-

leged (R. p. 6), and the findings and judgment disclose (R. pp. 169-173), that the matter in controversy exceeds the sum or value of $3000, exclusive of interest and costs. The pleadings further show that the action is one to recover moneys alleged to be due upon a contract, and in addition, damages for alleged breach of contract (R. pp. 6-24).

The District Court had jurisdiction of the cause under the provisions of Section 24 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 41). The issues of fact were tried and determined by the Court, without the intervention of a jury, pursuant to a stipulation duly filed (R. p. 175) under the provisions of United States Code Annotated, Title 28, Section 773.

This Court has jurisdiction to review, by appeal, the judgment of the District Court under the provisions of Section 128 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 225). The case is not one in which a direct review may be had in the Supreme Court under the provisions of Section 238 of the Judicial Code (U. S. Code Ann. Title 28, Sec. 345).

The rulings of the District Court in the progress of the trial of the cause may be reviewed by this Court upon appeal as provided for in United States Code Annotated, Title 28, Section 875.

STATEMENT OF THE CASE

This action was instituted by appellee, Twohy Brothers Company, as plaintiff in the Court below, to recover from appellant, Northern Pacific Railway Company, the sum of $691,874.66. To avoid confusion, we shall refer to appellee and appellant, in our explanation of the litigation, and in the argument to follow, as plaintiff and defendant respectively.

The action is based upon a contract entered into on October 15, 1925, under the terms of which plaintiff undertook to construct a branch line of railroad for defendant in northern Idaho. The work was commenced at once and was concluded in the latter part of 1927. Plaintiff's complaint was filed in the District Court in February, 1929. A word of explanation of the long delay to which the case has been subjected may be appropriate.

Shortly after the pleadings were completed, there was a reference to, and a preliminary trial before, an Auditor, who thereafter filed his report. Objections to this report and a motion to modify and correct it were submitted to the District Court on March 8, 1932. Thereafter the Court announced its readiness to dispose of the motion and objections in order to make the Auditor's report available for use at the trial of the cause, but no action was taken until a

substitution of counsel for plaintiff occurred, when, on November 4, 1935, a motion was filed for leave to amend the complaint. This was granted upon terms which plaintiff declined to accept (R. p. 177). Thereafter, as the result of a stipulation entered into on April 29, 1936, the case was submitted to the District Court upon the testimony taken in the preliminary trial before the Auditor (R. pp. 178-179).

The complaint purports to state a single cause of action. But there are in fact six separate claims alleged, two of them for money said to be due upon the contract, and four for damages for alleged breach of the contract. Three of these four may be considered together as one claim since they involve exactly the same question of contract interpretation. In result, there are four distinct claims or causes of action. The issues involved in each, and the disposition made of them by the District Court, are as follows:

I. Change of Work Claim

The first of the claims asserted by the complaint is that defendant made changes, during the progress of the construction of the railroad, in the work contemplated by the contract. Defendant had reserved the right to make changes, the unit prices for clearing, grading, etc., to be increased or decreased to accomplish substantial justice, whenever, in the judgment of

the Railway Company's Chief Engineer, any such changes materially affected the cost of doing the work.

The complaint alleged (1) that many changes had been made which greatly increased the cost of doing the work, (2) that the Chief Engineer so determined but that he undertook to allow a lump sum of $80,000 only in lieu of an increase in prices, and (3) that a payment to plaintiff of $326,785 was necessary because of the changes, in order "to do substantial justice between the parties," as required by the contract (R. p. 17). While the statement of changes compares the work performed with what defendant is said *to have represented* would be the work to be done (as if relief from the contract and recovery upon quantum meruit were sought), the District Court read the pleading as asserting the contract right to additional compensation when and as allowed by the Chief Engineer; and we understand this interpretation of the complaint is not questioned by plaintiff.

The District Court upheld defendant's contentions, first, that the work performed was, on the whole, the work contracted for and that no changes had been made which materially affected the cost of doing the work, and second, that the Chief Engineer had not been called upon to determine, and had not

determined, that any such changes had been made or that any increase of prices or equivalent additional payment was due the contractor by reason of alleged changes in the work (R. pp. 160-163).

The District Court's findings to this effect are not challenged by appellant. Its assignments of error present no question with respect to the claim for additional compensation based upon alleged changes in the work contracted for. The foregoing brief explanation of the claim has been made in order that the Court may have a clear understanding of the entire case. A more detailed explanation of the issues will no doubt be made by appellee, whose assignments of error upon its cross-appeal challenge rulings made in disposing of these issues.

II. Commercial Haul Claim

The second claim or cause of action asserted by the complaint seeks recovery of $329,184.70 damages for alleged breach of contract. The complaint alleged that under the terms of the contract for the construction work, plaintiff was given the exclusive right to haul (upon the railroad track when and as laid) all freight accepted for transportation from the public, this right to continue during completion of the construction work or until the railroad was turned over by defendant's engineering department (in charge

of construction) to its operating department (in charge of operation), payment to be made therefor on the basis of $1 per car mile (R. pp. 17-19).

It was further alleged that defendant, having obligated itself to handle a large volume of log tonnage during this period (that is, between the time of tracklaying and the time of final completion of construction) for a Timber Company, took immediate possession of the first 29 miles of the newly built line, and itself conducted this log transportation service. Plaintiff's claim was that if it had been permitted to handle this log tonnage, at the contract price of $1 per car mile, it would have made a profit of $329,184.70. Damages in this amount were demanded (R. pp. 19-22).

Defendant's answer and cross-complaint denied the existence of any contract right in plaintiff to conduct transportation service upon the branch line of railroad to be constructed, and asserted that the contract provisions to which the complaint referred contemplated nothing more than the movement of occasional cars of commercial traffic, in plaintiff's work trains, during the progress of the construction work. Defendant further alleged that in taking possession of a part of its line before final completion thereof, it acted within its rights under the contract, both be-

cause this merely relieved the contractor of some of the fiinishing work which the contractor could have been compelled to do without additional compensation, but also because the contract specifically gave the defendant the right to stop any part of the work at any time, or to change the work contracted for in any way desired, subject only to such price adjustment as might be determined appropriate by the Chief Engineer, in order to do justice between the parties (R. pp. 35-36).

Defendant further contended that since the time of opening its line to common carrier use was within its control, the amount of log traffic it accepted, after its decision to begin the transportation service at once when the track was usable, could not be taken as a measure of what commercial traffic would have been accepted for transportation by plaintiff in its work trains if no such decision had been made, and if the handling of cars of commercial traffic had been left to plaintiff at $1 per car mile (R. p. 36).

The District Court rejected defendant's interpretation of the contract and held that plaintiff was entitled, under the provisions of the contract referred to in the complaint, to conduct all commercial transportation service upon the track as it became usable, up to, but not beyond, the date specified in the con-

tract for completion of the construction work. This date was September 1, 1927; plaintiff's work was not in fact concluded until October 25, 1927, and defendant's engineering department did not turn the line over to the operating department until January 1, 1928 (R. pp. 169-170).

This interpretation of the contract resulted in a decision that defendant's action in taking possession of and using the first 29 miles of the railroad between July 17, 1927, and September 1, 1927, was a breach of contract. Damages in the sum of $125,000, based upon plaintiff's estimate of the profits it would have made in transporting the log tonnage handled by defendant between the dates specified, at $1 per car mile, were awarded (R. pp. 169, 173).

The questions presented by this appeal (with respect to the Commercial Haul Claim) are (1) whether the District Court erred in construing the contract as giving plaintiff the right to conduct transportation operations on the newly constructed line of railroad and to be paid $1 a car mile for all cars hauled, and as depriving defendant of the right to take immediate possession of its railroad in order to begin at once the transportation operations for which the road was intended, and (2) whether the District Court erred in accepting, as the measure of damages for the al-

leged breach of contract, what plaintiff might have earned if it had been permitted to handle the log tonnage actually transported by defendant.

These questions were raised in the Court below by defendant's motion for rulings interpreting the contract in accordance with its contentions (Defendant's Motion for the Adoption of Conclusions of Law II, III, IV and V, and of Special Findings of Fact XV, XVI and XVII), and by defendant's exceptions to the Court's order denying such motion (R. pp. 179-184), and by defendant's exceptions to the ruling upon these two questions contained in Finding of Fact XV as entered, and in Conclusions of Law II and III as entered, determining that defendant's actions constituted a breach of the contract entitling plaintiff to damages based upon the loss of Clearwater Timber Company log traffic (R. pp. 185-191).

The two questions were preserved for review by this Court through a bill of exceptions, duly allowed (R. pp. 175-273), and by defendant's Assignments of Error I to XIV, inclusive (R. pp. 346-360).

III. Bridge Material Claim

The third claim or cause of action (as we classify them for the purpose of the argument) includes the third, fourth, and fifth claims alleged in the complaint. All three involve a dispute as to the meaning

of the contract, and particularly as to whether the contract price for hauling bridge materials to the bridge sites was applicable to rail transportation of these materials in cases where the track had been laid to the bridge site in advance of the bridge construction, so that transportation by railroad became possible.

Plaintiff transported by rail in this way a substantial amount (1) of piling, for which it claimed payment at the rate of $.02 per lineal foot mile under Price Item 37 of the contract; (2) of bridge timber, for which it claimed payment at $.85 per thousand f. b. m. mile, under Price Item 38 of the contract, and (3) of metal fastenings for which it claimed payment at the rate of $.65 per ton mile, under Price Item 39 of the contract (R. pp. 21-23). These price items described the work as "hauling" (R. pp. 59-60). Plaintiff's contention is that these price items applied to all methods of hauling, by truck, team, or train.

Defendant's position is that the bridges were to be built *ahead* of the track and that use of the track for transporting bridge materials was never intended; that "hauling" in the price items meant bringing in the bridge materials by team or truck, or by dragging on tote roads or along the newly-constructed grade, and that Price Item 72 of the contract (R. pp. 38-41)

fixing a rate of $1 per car mile for rail transportation of company material covered any rail movement of bridge materials to bridge sites.

Defendant further contended that this question of contract interpretation was submitted to the Chief Engineer during the progress of the work, under the arbitration clause of the contract, and was decided by him adversely to plaintiff, and that the decision was accepted by plaintiff and acquiesced in by it during the progress of the work, and is controlling upon the Court.

The District Court accepted plaintiff's interpretation of the contract and held that defendant's refusal to pay at the rates specified in Items 37, 38, and 39, respectively, was a breach of contract. The difference between what was thus found due, and what was paid (at the rate of $1 per car mile) was allowed as damages. As to the piling, this amounted to $4693.29, as to bridge timber, $26,843.47, and as to metal fastenings, $1249.69 (R. pp. 38-40).

The District Court further held that the question of contract interpretation, as to the prices applicable to the hauling service, was not one for submission to or decision by the Chief Engineer under the arbitration clause of the contract, and that the claimed reference of the matter to him was not a submission of the

question to him or a decision by him under the contract, and that there was no pleading or proof of "estoppel against or waiver by" plaintiff (R. p. 171).

The questions for decision here are (1) whether the District Court erred in construing the contract as entitling plaintiff to payment for hauling bridge materials by rail, at the prices specified in Price Items 37, 38, and 39 of the contract, and (2) whether the District Court erred in holding and deciding that this question of contract interpretation was not one which could be submitted to or decided by the Chief Engineer under the arbitration clause of the contract, and in holding and deciding that what was done did not amount to a submission of the question to the Chief Engineer.

These questions were raised in the Court below by defendant's motion for rulings interpreting the contract in accordance with its contentions (Defendant's Motion for the Adoption of Conclusions of Law VI, VII and VIII, and of Special Findings of Fact XVIII and XIX), and by defendant's exceptions to the Court's order denying such motion (R. pp. 251-254), and by defendant's exceptions to the rulings upon these questions contained in Findings of Fact XIX and XX as entered, and in Conclusion of Law II as entered, determining that defendant's refusal to pay the prices claimed by plaintiff was a breach of con-

tract, and that the question of contract interpretation was not one which could be submitted to or decided by the Chief Engineer, and that there had been no valid submission or decision of the question, or waiver on the part of plaintiff (R. pp. 255-258). These questions were preserved for review by this Court through a bill of exceptions, duly allowed (R. pp. 175-273), and by defendant's Assignments of Error XV to XXV, inclusive (R. pp. 360-367).

IV. Final Estimate Claim

The fourth claim or cause of action (the sixth alleged in the complaint) demanded $26,938.03 as the balance due on numerous items of work; and it was alleged that defendant's Chief Engineer had refused to make a final estimate as required by the contract, showing this balance to be due, and that defendant had refused to make payment (R. pp. 23-24).

Defendant's answer alleged that the final estimate had been promptly prepared, but had been held up at plaintiff's request because of plaintiff's claims for additional compensation. Defendant further alleged that because of numerous advances and other debits, an accounting was necessary to ascertain what balance, if any, was due plaintiff (R. pp. 41-42, 50-51).

At the hearing before the Auditor, the parties reached an agreement as to this. It was stipulated that

the final estimate balance, excluding anything allowed on the change of work claim, the commercial haul claim, or the bridge materials claim, was $8865.75. Defendant concedes plaintiff's right to recover this amount, with interest from the date of the stipulation, February 13, 1930.

The District Court included in its findings one determining that defendant had breached its contract by failing to make a final estimate within thirty days after the completion of the work (R. p. 172). Defendant challenges the correctness of this decision (Defendant's Assignment of Error XXVI, R. p. 367), but since the balance due upon the final estimate is not disputed, the question raised will not be discussed.

Summarizing, defendant's appeal seeks to reverse the judgment of the District Court with respect to the second claim or cause of action, for breach of the alleged right to handle commercial traffic, and with respect to the third claim or cause of action relating to the prices payable for hauling bridge materials. No question is presented as to the first claim or cause of action, which the District Court decided in favor of defendant, or as to the fourth claim or cause of action, as to which the parties are in agreement.

SPECIFICATION OF ERRORS

Appellant relies upon the following assigned errors:

1. Defendant's Assignments of Error Nos. I to XV, inclusive (R. pp. 346-360).

2. Defendant's Assignments of Error Nos. XV to XXV, inclusive (R. pp. 360-367).

ARGUMENT

Introduction

Defendant found it necessary, in order to reach the precise rulings of the District Court, rather than the final decision resulting therefrom, to assign a considerable number of errors. But the questions of law presented are few in number. The first group of assignments, Nos. I to XIV, inclusive, present two questions of contract interpretation: (1) Was plaintiff entitled to the exclusive right to haul commercial traffic upon the road it built for defendant, from the time of tracklaying to the contract date for completing the work? and (2) if so, can the damages for deprivation of that right be measured by the volume of traffic handled by defendant in its operation during this period?

The second group of assignments, Nos. XV to XXV, inclusive, likewise present questions of contract interpretation: (1) What was the contract price for plaintiff's services in hauling bridge material, and (2)

was this question one which the Chief Engineer of defendant could decide under the arbitration clause of the contract, and (3) if so, was the reference to him and his ruling thereon such a submission and decision as was contemplated by the contract?

We shall discuss the two subjects to which these two groups of assignments respectively relate, in the order stated.

I.

COMMERCIAL HAUL CLAIM

First Summarized Assignment of Error

The District Court erred in holding and determining that the contract between the parties gave plaintiff the right to haul all commercial traffic upon the newly constructed railroad, or any part of it, from the time of tracklaying to the time specified by the contract for final completion of the work, to the exclusion of any right on the part of defendant to take possession of and to use its railroad or any part of it, whenever it deemed such railroad, or part thereof, ready for use.

(The foregoing is a summary of defendant's Assignments of Error Nos. I, II, III, V, VI, VII, VIII, X, XI, XII, and XIV, R. pp. 346-355, 357-360. These Assignments are printed in full in the appendix to this brief.)

Point 1

The contract between the parties was one for the construction of a railroad; the provision obligating plaintiff to haul cars of commercial freight in its work trains, conferred no right beyond that of transporting such cars in its work trains, at the contract price of $1 per car mile, while the construction work continued.

The right asserted by plaintiff to take and retain possession of a part of the railroad to be built, against the wish of its owner, and to haul thereon train loads of logs in commercial traffic at a price vastly in excess of the amount collected from the shipper, is not one readily discernible from the contract itself. But plaintiff says that this right is to be inferred from the language used in one of the Price Items, when read with two or three of the requirements for tracklaying and surfacing which appear in the Specifications attached to the contract.

The Court will note at once that the contract is one for the construction and not the operation of a branch line of railroad. The form is that of the ordinary railroad construction contract with which the courts are not unfamiliar. Before examining in detail the provisions of the contract and its specifications, upon which plaintiff relies, we pause to review the circumstances which gave rise to the assertion of the claim.

Defendant's Orofino branch was built primarily for the purpose of log transportation. The Clearwater Timber Company, which had undertaken the construction of a large lumber manufacturing plant at Lewiston, was to be the principal shipper (R. pp. 284-285). The contract between plaintiff and defendant for the construction of the railroad (dated October 15, 1925) provided that the grading, bridging, tunnels and tracklaying were to be completed on or before June 1, 1927, and that all work under the contract was to be completed on or before September 1, 1927 (R. p. 52).

In August, 1926, defendant was advised by the Timber Company that its Lewiston mill would be ready to receive logs by June 1, 1927. The volume of log tonnage anticipated was such as to require the movement of about 60 cars a day in each direction, which meant the operation of at least two trains with heavy power. To meet this requirement so far as it might be possible to do so, defendant determined that it would take over and begin the use of a part of the new line (the first 29 miles, between Orofino and Jaype) whenever the work on that part had progressed far enough to make the track usable even though all of the work upon this piece of track called for by the contract had not been completed (R. pp.

211, 232). Plaintiff was notified of this plan by letter written August 3, 1926 (R. p. 210-211). There was no direct response to this letter. The record is somewhat vague as to whether plaintiff at this time challenged defendant's right to proceed in the manner proposed; in a conversation on this and another subject (the application of the "hauling" prices to rail transportation of bridge materials), plaintiff's secretary remarked that the contract provisions would control, whereupon he was cautioned against a "too literal" interpretation of the contract (R. pp. 195, 234). At any rate, if any question was raised, it was dropped for the time at least by a letter written soon after, indicating complete acquiescence in the ruling of defendant's Chief Engineer upon both subjects (R. pp. 196-198).

During the following winter and spring plaintiff encountered many difficulties and there were frequent appeals to defendant for help. Finally, to avoid the complete collapse of the work and the threatened bankruptcy of plaintiff, defendant undertook the financing of the job under the terms of a supplemental contract entered into in April, 1927 (R. pp. 234-239, 145-147). Except for a casual reference attributed to defendant's Chief Engineer which he denied having made (R. p. 236), the subject of log transportation after track-

laying and before completion of all contract work was not mentioned during this period (R. p. 239).

No commitment had been given the Timber Company as to the time when logs would be accepted for transportation on the new line (R. pp. 231, 242), but in April, 1927, defendant filed with the Public Utilities Commissioner of Idaho a tariff quoting rates on logs from points on the new line to Lewiston and another point (R. pp. 247-248). In June, 1927, plaintiff orally and by letter asserted the right to conduct the proposed log train operation at the "commercial haul" price of $1 per car mile (R. pp. 200-207). Thereafter, on July 8, 1927, defendant gave plaintiff written notice to stop all work under the contract on July 16, 1927, on that part of the line between Orofino and Jaype, but to continue and complete the contract work on the remainder of the line (R. p. 205). Plaintiff accepted this notice and complied with the direction given, but registered a protest that it considered this a breach of the contract (R. p. 206).

On July 17, 1927, defendant began the operation of its log trains upon the part of the new line thus taken over. Between the opening date and October 25, 1927 (when all work by the contractor ended), 5250 cars of logs and 62 cars of other commodities

were handled; at the end of the year (when defendant's operating department took charge) there had been hauled a total of 7530 cars of logs and 344 cars of other commodities. These cars were moved a total of 443,184.70 car miles (R. p. 193).

Plaintiff's claim is that but for the alleged breach of contract, it would have hauled this tonnage and would have collected $443,184.70 from defendant at the "commercial haul" price of $1 per car mile. Its estimate of operating costs for the period was $114,000, leaving an anticipated net profit of $329,184.70, which amount it specified in its complaint as the damage sustained.

Briefly stated, plaintiff's contention is that the transportation of commercial freight was an essential, and to it a most important, part of the construction job, of which it could not lawfully be deprived. It is said in effect that plaintiff was engaged both to build the railroad and to conduct commercial transportation operations upon it for a definite period, and that defendant had no more right to exclude plaintiff from this transportation service than it had to deprive plaintiff of the work of building the grade or constructing the bridges.

Granting for the moment that defendant had no right to make any such substantial changes in the

work contracted for (despite the broad power given by the last paragraph of the contract to change the quantity, location, or nature of the work, conditioned upon an appropriate price readjustment, later to be discussed), is plaintiff's premise sound? Can the contract possibly be interpreted as giving plaintiff the exclusive right to operate trains hauling commercial traffic during the specified construction period, regardless of defendant's willingness to accept the construction work done prior to the expiration of this period, as sufficient compliance with the contract requirements, so as to permit defendant to begin at once the railroad operation for which the road was built?

We think these questions must be answered in the negative, for the following reasons:

1. Commercial Haul Incidental to Construction Work

Plaintiff was engaged to build and not to operate a railroad. Its agreement was to furnish

> "all labor, service and material for, . . . and to construct, complete and finish, . . . the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting, *and all other work for which prices are hereinafter named* on the branch line of the Railway Company extending from Oro Fino to Headquarters in the State of Idaho." (Italics ours.)

The hauling of cars of commercial freight over the newly laid track was not included in the work specifically described. It was part of the "other work" required of plaintiff by the clause we have italicized. What this other work might be was indicated, first, by the statement of unit prices in the contract (which evidently covered everything the contractor might possibly be called upon to do in the course of the construction work, R. pp. 56-65), and second, by the specifications attached to the contract which stated with particularity the manner in which the work was to be done.

With few exceptions, the work described in the price items in the contract itself is clearly part of the clearing, grubbing, grading, etc., which the contractor specifically agreed to do in building the line. But there are a few cases where the obvious purpose was to cover incidental services, not directly or necessarily a part of the construction work. Item 3 fixed a price for cutting isolated and dangerous trees (R. p. 56). Item 73 provided for the hauling of cars of material "in addition to contractor's own material," from the existing line to material yard tracks (R. p. 64).

Another, and apparently the only other item of this kind is Price Item 72, upon which plaintiff relies. It reads as follows (R. p. 63):

> "Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile .....$1.00"

This is all there is in the contract itself to obligate, and correspondingly to entitle, the contractor to haul "commercial business" upon the newly laid track. But the extent of the obligation imposed, and of the right conferred, is made clear by the Specifications for Tracklaying, Surfacing and Ballasting attached to and forming a part of the contract. Item 1 of these Specifications describes in general terms the tracklaying work (R. p. 121). Under the heading "Train Service," Item 2 provides that the Railway Company shall furnish work train service for ballasting, and that (R. p. 122)

> "All other work train service for track work, rail laying, etc., shall be furnished at the expense of the Contractor."

It is in Item 6 of these Specifications that we find provision made for handling cars other than those in use in the tracklaying or ballasting operations. The language used is significant. Item 3 indicated what

work train service would be required of the contractor and what would be furnished by the Railway Company; Items 4 and 5 made provision for car supply. Item 6 obligated the contractor to include in its work trains all extra car movement, as follows (R. p. 123):

> "6. Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other Contractors. The specified contract price per car mile to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company."

Following these provisions for work train service, the requirements for the track work were stated in detail. Train operations by the contractor for a considerable time after tracklaying were contemplated, but the Specifications made it quite clear that the contractor was not required, nor was it entitled, to continue train operations for any fixed period. The contractor's obligation was to continue the track work until the roadbed and track were acceptable to the Railway Company; and it should be kept in mind that acceptance of the track without requiring everything called for by the Specifications would not reduce the con-

tractor's earning on this branch of the work, since all tracklaying and surfacing work were paid for at a fixed sum per mile (R. pp. 62-63).

The particular specifications to which we have reference are these:

Item 15, relating to the placing of angle bars, has the following provision (R. p. 126):

> "After the track work has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight."

Item 26, relating to elevation of rails on curves (in the surfacing work), provides as follows (R. p. 129):

> "The track shall all be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer."

Item 34, under the heading "Completion Maintenance Acceptance," reads as follows (R. p. 131):

> "34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so maintained by the Contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until it is fully completed."

Item 38, providing for the bedding and tamping of ties, has the following requirement (R. p. 132):

> "Particular attention must be paid to this matter and no track will be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to standard plan, and all slopes neatly dressed."

Item 39, relating to outer rail elevation on curves in ballasting work, has the same requirement for maintenance until acceptance by the Engineer as that stated in Item 26 relating to surfacing work, as follows (R. p. 132):

> "The track shall be well lined and have a smooth and even surface, and shall be kept in that condition until accepted by the Engineer."

Under these specifications, the contractor was required to get the new track in usable condition before the Railway Company was obligated to accept it. This required work train service, which the contractor was obligated to provide; and while the work continued and the contractor's work trains were in operation, the contractor was required to handle in those trains whatever commercial freight the Railway Company decided to have transported.

Nothing more than this was required of the contractor. The contract proper obligated it to handle

commercial business only as "other work" which might be involved in one or more branches of the construction job. The specifications defined the obligation with particularity; as defined, it was limited to the movement of cars of commercial freight as a part of the contractor's work train service while the contractor was engaged in completing the track work.

If the advantage had been the other way,—if the log cars were to move only short distances so that the car mile rate prescribed by the contract would have yielded no profit, is it conceivable that the contractor could have been compelled to organize train service and conduct extensive freight train operations, because of its obligation to handle commercial business in its work trains? The immediate answer to any such demand would have been that the contractor was engaged to build the line, and not to operate it, and that no obligation to conduct freight train operations for the owner could be implied from the requirement for handling commercial cars in work trains during track finishing work.

Because the log haul proved advantageous, plaintiff asserted the right to run trains in commercial freight service *after* its track work on the particular part of the line had ended and its work train service terminated. But the same answer is to be made; the

contract imposed no duty, nor did it grant any right, to haul commercial cars except in the course of the track finishing work, and while the contractor was operating work trains in that service.

2. Duration of Track Work Within Defendant's Control

It is an essential of plaintiff's theory that defendant could not lawfully curtail the track construction work and thus deprive plaintiff of an opportunity to handle commercial business at the contract price of $1 per car mile; plaintiff interprets the contract as giving it the right to handle all commercial business, whether in its work trains or in regular freight service, during the entire construction period.

But what is the construction period and when did it end? The contract obligated plaintiff to complete the tracklaying by June 1, 1927, and to complete all work under the contract by September 1, 1927 (R. p. 52). These were time limits, however, imposed upon the contractor; they did not obligate, nor did they entitle, the contractor to stay on the job to the dates specified, if the work could be finished at any earlier time.

We assume plaintiff does not dispute this; its argument seems to be that it was entitled to continue at work until it had done everything which it could have been compelled to do in bringing the track to a

high standard of completion, even though the Railway Company was willing to accept something less and to pay the full contract price for it.

This is a strange interpretation to put upon the contract. The Railway Company bound itself to pay $1400 per mile for tracklaying and $1200 per mile for surfacing. For these payments it could require considerable supplemental work after actual use of the track began, to the end that when the track was finally accepted it would be ready at once for heavy traffic (R. pp. 128-131). But if the Railway Company was willing to take less for its money than the full measure of service that could have been exacted from the contractor, what is there in the contract to forbid this?

Plaintiff argues that what the Railway Company could demand it was obligated to demand *because* acceptance of less would shorten the time of possession of the line by the contractor and curtail its opportunity to haul commercial freight at a profit. There is no claim that plaintiff was deprived of any construction work for which it would have been compensated. It is the loss of the commercial freight hauling of which plaintiff complains; and the contention, in result, is that the right to haul commercial freight during the course of the construction work forbade any

curtailment of this work,—that the Railway Company, though willing to pay the full contract price for the track construction, could not accept less than a perfect job in order to begin the operations for which the railroad was intended, because the contractor would thereby lose some of the commercial haul it expected to secure.

A statement of the contention is sufficient to demonstrate its fallacy. Plaintiff was entitled to haul commercial freight only while its track completion work was going on. Defendant could require, but was not obligated to require, the continuance of this track work until a perfect job resulted. Its decision to accept less than it might have demanded under the specifications was within its rights under the contract. The duration of the track construction work, and of the period in which plaintiff might haul commercial freight, was a matter entirely within defendant's control.

3. Additional Considerations

The record has some evidence, for the most part uncontradicted, which indicates that the parties did not intend to contract for commercial freight transportation by plaintiff except as an incident to track construction work and while work trains were in operation.

(a) The hauling of logs during construction was entirely within the control of the defendant. No commitment had been given the Clearwater Timber Company as to the time the logs would be accepted for transportation on the new line. The Timber Company had been told that the railroad would be ready to haul logs by the time the Timber Company had its log pond ready to receive them; and as it turned out, the Timber Company's log pond was not ready for a considerable time after log transportation began (R. pp. 231-232, 242).

Eleven contractors submitted bids for the building of the railroad. Their prices under Item 72, applicable to commercial haul, ranged from 50 cents a car mile to $5 a car mile. In comparing the bids (by applying the unit prices bid to estimated quantities) no quantities at all were set up for commercial haul. Defendant's Chief Engineer expected that only an occasional car might be moved and assumed that the effect of this would be negligible upon the performance of the contract (R. pp. 231, 242).

Defendant had contracted with the Clearwater Timber Company for log transportation at a rate which allowed $1.60 per thousand feet for the haul on the new line. This yielded $9.75 per car. At the rate of $1 per car mile payable to the contractor, assuming the contractor to be entitled to conduct the transportation, de-

fendant would have been required to pay the contractor $56.40 per car for the identical service for which the Timber Company had paid defendant $9.75 (R. p. 233).

Defendant of course did not intend to have the contractor conduct the log transportation for it, at a price almost six times that paid for the service by the shipper. If defendant unwittingly entered into a contract that put it into such a disadvantageous position, that of course is its misfortune. But if the contract could possibly be thus construed, its provisions are at least ambiguous and the evidence to which we have referred shows that the minds of the parties did not meet upon any such engagement as that now contended for by plaintiff.

(b) Plaintiff's assertion that it anticipated a profitable log haul operation when it entered into the contract (R. pp. 218, 224) is negatived by the record, which indicates clearly that the claim here made was an afterthought, originating late in the performance of the work.

Defendant's Chief Engineer first advised plaintiff of the plan to take over a part of the line before final completion of track work, by letter written August 5, 1926 (Exhibit A-2, R. pp. 210-211). The work had then been in progress almost ten months. This letter was received by the contractor at a time when its of-

ficers were giving much attention to the financial problem involved in keeping the work going. But the letter, which gave preliminary notice that the contractor would be deprived of work counted on to yield $300,000 profit (according to the contention here made) was not even mentioned in their discussion (R. pp. 218-223).

Soon after, plaintiff's secretary went to St. Paul to solicit an advance of $50,000 from defendant's Chief Engineer. A dispute had arisen as to the contract price applicable to rail transportation of bridge materials (the third claim or cause of action in this litigation). This question, as well as defendant's plan to begin log transportation in advance of final completion of track work, was brought to the attention of plaintiff's secretary. His statement was that whatever the contract said would control, whereupon he was cautioned against a "too literal" interpretation of the contract (R. pp. 194-195, 212, 233-234).

Within a few days of this conversation, plaintiff's secretary wrote defendant's Chief Engineer for the purpose of making his position clear upon the two questions discussed. This letter, which was dated August 17, 1926, read in part as follows (Exhibit 32, R. pp. 196-197):

> ". . . We are to build this line to your full satisfaction, and in all the activities and operations in-

volved in that program we wish to comport ourselves and expect to be treated as a Department of the Northern Pacific under your direction, serving and advancing in every way we can the best interest of the company. I do not mean to imply, of course, that our contract does not substantially define and specify our duties, nor that we would ever seek to foist on you any of our proper responsibilities under it. I only want you to know that I regard our contract not as a strait jacket preventing any free modifications for the benefit of the work, and certainly not as a kind of legal fish-pond to hook advantage out of, but simply as a mutual written understanding, as exact and detailed and specific as it can possibly be made in advance, which sets out the method and time and price governing a complicated job we agree to do for you.

Under its letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretative complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including these two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the general principle governing all of us and underlying the whole contract."

During the ensuing eight months, plaintiff was constantly in difficulty financially and repeatedly so-

licited advances from defendant. No claim of right to conduct log haul transportation was advanced during this period, although plaintiff's secretary and its superintendent say that at one time (in November, 1926) defendant's Chief Engineer spoke of the possibility of a sub-contractor making considerable money out of the log haul (R. pp. 199-200, 216). This was denied by defendant's Chief Engineer (R. p. 240).

Passing this dispute in the evidence, the significant fact is that in April, 1927, plaintiff's affairs reached a crisis, and in this crisis plaintiff came to defendant for rescue with never a suggestion or hint that plaintiff had been deprived or was about to be deprived of any profitable work under the contract. On April 8, 1927, plaintiff's secretary, accompanied by plaintiff's banker (Mr. D. W. Twohy, chairman of Old National Bank of Spokane, R. p. 237), called upon defendant's Chief Engineer and announced that plaintiff was at the end of its resources, and stated that unless he (defendant's Chief Engineer) could find a way out for plaintiff, it would have to give up the job (R. p. 239).

It is altogether impossible to believe that at this time, April, 1927), plaintiff's officers and representatives entertained any notion that within two or three months they would be undertaking highly profitable

log transportation or that they then thought plaintiff had any right to do so under the contract. Their attitude was one of deep regret over plaintiff's financial plight, with no claim or demand of any kind that plaintiff be permitted to haul the Clearwater Timber Company's logs as commercial freight under the contract. Instead, earnest pleas were made that some way be found to keep plaintiff on the job, in order that its long and honorable career as a contractor should not end in bankruptcy and disgrace (R. pp. 244-245).

These requests were acceded to; a supplemental contract was entered into on April 26, 1927, with the Old National Bank as an additional party, which, after reciting plaintiff's default and defendant's right to cancel therefor, provided for the continuance of the work under a plan of financing by defendant (R. pp. 145-147). Plaintiff thereupon resumed work, and it was not until some time in June, 1927, that the right to conduct the log hauling operations was asserted (R. pp. 200-207).

It is apparent from the history of these events that plaintiff did not always consider the construction contract as giving it the valuable right now asserted. Certainly there was no occasion for its abject surrender, at the time the supplemental contract was

entered into, if it claimed the right presently to begin profitable log hauling operations. We submit this history as additional proof that the parties understood and interpreted the construction contract as providing for commercial haul by plaintiff only as a part of its work train operations while actually engaged in track construction work.

To summarize, appellant maintains that the contract provision under consideration cannot be interpreted as imposing an obligation, or as granting a right, to haul commercial freight for any fixed period, but only while the contractor was engaged in completing the track and was operating work trains in that service. When that track work ended, the obligation, and the right, to haul commercial freight ended with it.

We assume that in other circumstances the right of the Railway Company to take over and begin the use of its railroad whenever it considered the track usable, even though the contractor had not done everything that might have been required, could not be questioned. It is questioned here upon the theory that the contractor was engaged to haul commercial freight upon the new line for a definite time without regard to the continuance or cessation of the track construction work. We assert that the contract cannot be so

read and that the Railway Company violated no right of the contractor in making use of a part of its line without waiting for all of the track completion work that might have been required of the contractor.

Point 2

Defendant acted within its rights under the contract in stopping all work by plaintiff on the first twenty-nine miles of the line before completion of all track work, in order to permit defendant to begin log transportation.

When plaintiff indicated to defendant (in June, 1927, R. pp. 200-207) that plaintiff proposed to object to defendant's plan to begin the use of the line in the early summer of 1927, defendant served written notice, under the "stop-work" clause of the contract, directing plaintiff to discontinue all work on July 16, 1927, upon that part of the line which defendant intended to use (R. p. 205). Plaintiff complied with this notice, but asserted that defendant's action was an anticipatory breach of the contract (R. pp. 206-207).

The stop-work clause of the contract reads as follows (R. p. 68):

> "The Company at any time before completion may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof. On receiving such direction the Contractor shall stop work or diminish

> the force as directed, and shall have no claim whatsoever for damages by reason thereof, but shall receive payment for the work done in full discharge and satisfaction of all demands against the Company. Any notice given by the Company under this paragraph shall be in writing signed by the Chief Engineer, and shall be delivered to the Contractor or some person on the work representing him at least five (5) days prior to the required stoppage or reduction."

This provision of the contract reserved to defendant the right to do exactly what was done. Further track completion work on the first 29 miles of the line was stopped entirely. Defendant had determined that it could get along without all of the surfacing, lining, adjusting, etc., contemplated by the specifications. A large sum of money had been invested and it was essential to begin operations as soon as possible. The Clearwater Timber Company had asked for service and defendant concluded that it could advantageously forego some of the contractor's track work in order to get the line into operation as quickly as possible.

Can there be any doubt of defendant's right to do this under the "stop-work" provision of the contract? Such clauses appear in railroad construction contracts because large capital expenditures are involved, the construction work often continues for several years,

and the owner must be free to meet changing conditions without facing liability to the contractor for discontinuance of any of the work originally planned. *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695, 696.

The right reserved was to stop the work, *or any part thereof*. Whatever the occasion or purpose, whether to postpone all work because of delays encountered by the prospective shipper, or to hasten the beginning of operations to meet an unexpected demand for service, the construction work could be retarded, or halted entirely, upon the whole line or upon any part of it.

The right thus reserved was unrestricted; it could be exercised even though the result would be to eliminate construction work of advantage to the contractor. *Warren-Scharf Co. v. Laclede Co.*, supra. Here there is no claim that any advantageous *construction* work was taken away, or that anything further would have been paid to the contractor for track work if it had done everything called for by the specifications. But even though this had not been true,—if the work which was stopped would have been profitable, defendant's action in curtailing the construction work was nevertheless within its rights under the contract.

But plaintiff says that defendant resorted to the "stop-work" clause in bad faith for the purpose of depriving plaintiff of the profitable log haul. It is said, in effect, that the transportation of logs for the Clearwater Timber Company was a part of the construction job contracted for, and that defendant did not "stop" this part of the work within the meaning of the contract, but took it away from plaintiff and did it itself.

We have already pointed out that plaintiff was engaged to construct the railroad and not to operate it. There is nothing whatsoever in the contract, either directly or inferentially, to obligate plaintiff to operate a single train over the newly laid track, other than the work trains necessary for construction purposes. As to commercial freight, plaintiff was required to include cars carrying such traffic in its work trains. This was the limit of its obligation, and of its right, as was made quite clear by the tracklaying and surfacing specifications.

Let us assume for the moment, however, that the contract is susceptible of the construction plaintiff would place upon it. Upon this assumption,—that the transportation of commercial freight was an independent part of the construction job, is the "stop-work" clause inapplicable? Defendant had the right at any

time before completion to stop the work "or any part thereof" (R. p. 68). This certainly would permit defendant to halt ballasting and surfacing work at any time, if immediate use of the road was desired. If the transportation of commercial freight was a like part of the construction job, is there any reason why it could not also be stopped, in order to permit defendant to begin the use of its property?

Plaintiff's only answer is that stopping work under this provision of the contract meant complete cessation of all work and that no one activity could be suspended, particularly where the owner proposed to do this part of the work itself. But the right reserved was not merely to halt all work, but to stop *any part* of the work. There was no limitation or restriction upon this reserved right. If it developed that some part of the construction job under way could be completed advantageously after the owner's use of the property began, the owner had the right, for this reason or for any other reason, to stop the contractor's operations in this particular, and to make any substitute arrangement desired for the completion of the work.

This is literally what the parties agreed to in their contract. That it was intended, even though the contractor might be deprived of profitable work, is made clear by the provision of the contract (in the final

paragraph) for price adjustments in order to accomplish substantial justice, in the event of changes or reductions in the amount of work to be done. This provision reads as follows (R. p. 72):

> "The Company reserves the right at any time to change in whole or in part, as it may seem expedient, the line and grade of the railroad or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for 'extras' or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the Chief Engineer shall deem the change to have materially affected the cost of doing the work, he shall determine the price to be paid, either above or below, as the case may be, the prices herein provided, so as to do substantial justice between the parties."

This provision of the contract afforded plaintiff full protection against hardship due to the loss of any profitable work. The evident purpose was to leave the Railway Company free to change the work or reduce the amount to be done by the contractor, in any way desired, the contractor to be compensated, if the changes resulted disadvantageously, by appropriate price adjustments covering the work left in the hands of the contractor.

With this safeguard available, plaintiff is in no position to challenge the good faith of defendant in its resort to the "stop-work" provision of the contract. What defendant did was to begin the transportation operations for which the line was built. If this deprived plaintiff of an opportunity to make a profit, which we deny, the contract provided for a suitable adjustment so that substantial justice to both parties would result.

Even without a provision of this kind, a reservation of the right to stop work in a railroad construction contract has been literally enforced by the courts. In *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695, the Circuit Court of Appeals for the Eighth Circuit had before it a railroad construction contract which reserved to defendant the right to suspend all work, either temporarily or permanently, at any time. This right was exercised when the work had been partly done, whereupon plaintiff sued for its anticipated profits. The court, in sustaining the right to suspend work notwithstanding the resulting loss to the contractor, said:

> "The parties to the agreement had in mind both a temporary and a permanent suspension of the work, and, in language which cannot be misunderstood, stipulated that the defendant company might suspend operations under the contract, either temporarily or permanently (that is, abro-

> gate the contract altogether), on 10 days' notice. . . . It was entirely competent for the parties to enter into such an agreement, and such stipulations are sometimes found in contracts for the construction of railroads, and for the doing of other work of a like character, where unforeseen events may occur to render a temporary or permanent suspension of the work both desirable and necessary. We perceive no reason whatever for indulging in the assumption that, when the parties agreed that the work might be suspended permanently at the election of the defendant company, they did not mean what they said, but used the word 'permanently' in some new and strange sense."

Cases likes *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 Pac. (2d) 651, upon which plaintiff chiefly relied in the Court below, are not at all in point. The *Molyneux* case involved a contract for driving a tunnel, the length of the tunnel to be determined in the judgment of the owner, dependent upon the quantity of water released. The owner stopped work before the tunnel was half through, deciding to do the rest of the job itself. This was held to be a breach of the contract upon the part of the owner, since the termination of the contractor's work was not the result of any determination by the owner of the length of the tunnel to be driven.

The contract in the *Molyneux* case had no provision authorizing the owner to stop any part of the work at any time or to change or reduce the amount of work to be done by the contractor. This is true of other cases cited by plaintiff to the Court below. So far as we have been able to find, no decision of any court has denied the validity of broad provisions such as those before the Court in the case at bar, particularly where appropriate means are provided for safeguarding the contractor against the loss of profitable work.

We submit that if plaintiff had the right under the contract to conduct the transportation of commercial freight from the time of track laying to the date specified in the contract for the completion of all work, defendant was within its rights under the contract in terminating that service by the contractor.

COMMERCIAL HAUL CLAIM

Second Summarized Assignment of Error

The District Court erred in holding and determining that plaintiff is entitled to recover damages for defendant's alleged breach of contract in refusing to permit plaintiff to haul commercial freight between July 17, 1927, and September 1, 1927, based upon the volume of log traffic handled by defendant in the operation of its railroad between these dates.

(The foregoing is a summary of defendant's Assignments of Error Nos. IV, IX, and XIII, R. pp. 348, 356, 359. These Assignments are printed in full in the appendix to this brief.)

> *Defendant was under no obligation to transport freight for the public during the construction of its line. The "commercial business" to be hauled by plaintiff was only such freight as defendant might accept for transportation during the construction period. The volume of log traffic handled by defendant, after it had terminated the construction work, cannot be used as a measure of what would have been accepted and transported if the construction work had not been terminated, and if it had been necessary to delegate the hauling to plaintiff at the price of one dollar per car mile.*

We restate briefly the facts necessary to an understanding of this question:

Defendant had made no commitment to the Clearwater Timber Company as to the time when logs would be accepted for transportation (R. p. 231); the hauling of logs during construction was entirely within the control of defendant's Chief Engineer; he assumed that an occasional car might be moved, but had never contemplated hauling logs for the Clearwater Timber Company in any regular operation under the "commercial haul" clause of the construction contract (R. p. 242).

On August 3, 1926, defendant advised plaintiff of its plan to begin operations on a part of the new line in June, 1927, without waiting for completion of all construction work thereon (R. pp. 210-211); defendant had just been advised that Clearwater Timber Company expected to be ready to make shipments at that time.

In April, 1927, defendant filed a so-called "construction" tariff with the Public Utilities Commissioner of Idaho, effective April 12, 1927, quoting a rate on logs from points on the new line to Lewiston, Idaho. This tariff stated that the shipments would be moved by and at the convenience of defendant's construction department until the formal opening of the line (R. p. 248).

On June 23, 1927, plaintiff advised defendant of its objection to defendant's plan to conduct operations upon a part of the line (R. p. 200). On July 8, 1927, defendant gave plaintiff written notice to stop all work between Orofino (where the construction work started) and the northerly end of Jaype Siding, on July 16, 1927 (R. p. 205).

Defendant began the transportation of logs on this part of the line on July 17, 1927. Between this date and October 25, 1927, defendant transported cars of logs a total of 304,301.08 car miles (R. p. 229).

Plaintiff estimated that if it had conducted the transportation, its operating costs would have been $595.90 per day (R. p. 218). The trial court held that plaintiff was entitled to damages based upon what it would have earned in transporting the logs which were in fact hauled by defendant, between July 17, 1927, and September 1, 1927, the contract date for the termination of the construction of the line. No evidence had been introduced to show the volume of traffic handled in this particular period, but the Court estimated the damages, based upon the record as to logs moved for longer periods, at $125,000 (R. pp. 339-340).

Appellant submits that the trial court was in error not only in deciding that defendant had breached its contract with plaintiff, but in awarding damages for the loss of the "commercial haul" under the construction contract, based upon the volume of business handled by defendant after it took the line over and began operations. Such an award necessarily assumes that the log traffic actually transported by defendant would have been accepted for transportation by defendant, and would have been turned over to plaintiff for handling as "commercial business," if the alleged breach of contract had not occurred.

This assumption misinterprets the contract. The

commercial business to be hauled by plaintiff was only such cars of freight (belonging to others than plaintiff or defendant) as defendant might decide to have moved over the new line while the construction work was in progress. Plaintiff's undertaking was to build the railroad, and during the final stages of the track work, to haul in its work trains any commercial freight accepted by defendant for such transportation. Defendant assumed no obligation to plaintiff to provide a single car to be thus transported. The contract could not have been misunderstood in this respect, since the road would not assume the status of a common carrier until construction ended and it was formally opened for service to the public; and there was no commitment to the Clearwater Timber Company or to anyone else that freight would be handled during the construction period except at the convenience of defendant's Engineering Department in charge of the construction work.

To meet the needs of a shipper definitely made known to defendant long after the contract with plaintiff was entered into, defendant decided to take over a part of the line and begin service upon it, before plaintiff had completed all of the track work contemplated by the contract. What "commercial business" did plaintiff lose thereby? What cars of commercial freight

would have been hauled by plaintiff for defendant, at the price of $1 per car mile, if defendant had not taken over the line as it did?

Obviously defendant would not voluntarily have undertaken extensive transportation service for Clearwater Timber Company, with plaintiff still at work on the line, if this required turning the cars over to plaintiff to be hauled at the commercial haul price specified by the contract. The shipper could hardly be expected to pay more than was actually paid, which amounted to $9.75 per car, as contrasted with $56.40 per car to be paid to plaintiff at the commercial haul price of $1 per car mile.

But we are concerned here not with what defendant might or might not have done under different circumstances, but with what defendant was legally obligated to do if the alleged breach had not occurred. Plaintiff cannot be said to have been deprived of profitable work under the contract unless the contract made it certain that plaintiff would have gotten that work but for the action taken by defendant.

The contract cannot be so read. Defendant was entirely free to accept or refuse commercial freight during the construction period. If plaintiff had remained in possession of the line until the completion of all possible track work, and if during the entire period

defendant had decided against moving any freight for the public, no claim could be made that plaintiff had been deprived of anything to which it was legally entitled under the contract.

In result, plaintiff lost nothing more than could have been taken from it even though it had been permitted to remain in possession of the line until all possible track work had been completed. The opportunity of transporting commercial business was taken away, but it was only an opportunity the exercise of which was always limited by the discretion of defendant.

Thus the award of damages made by the trial court rests only upon speculation as to what defendant would have done if plaintiff had been permitted to complete the track construction work. It is possible that the shipper might have been persuaded to pay a higher rate and that defendant would have accepted substantial log traffic to be hauled for it by plaintiff at the contract price. It is also possible, and as the record indicates, far more probable, that defendant would have declined to accept anything more than the occasional car of commercial freight contemplated when the construction contract was entered into.

Damages for alleged breach of contract require a more substantial basis than this. The injured party

is entitled to redress for the loss of what the contract assured him, and not for what he expected might be secured under it.

We cite as an illustration of this distinction the case of *Dennis v. Slyfield,* 117 Fed. 474. The owners of a vessel declined to go on with a written arrangement under which they had agreed to carry any or all of certain lots of hardwood lumber, as might be desired by the owners of the lumber during a certain season of navigation, at specified prices. This arrangement was held lacking in mutuality and therefore unenforceable. The court said (page 477):

> "It is not contended by the learned proctors who represent the libelants, that this writing of and by itself obligates the libelants to ship even a single carload of lumber by the vessels named. The respondent thereby agreed to carry at a price named all the lumber which libelants might from time to time during the season deliver to him for carriage, but it does not obligate the opposite party to do more—even by implication—than to pay him the prices named for the carriage of all lumber delivered for carriage during the season. The contract is therefore void for want of mutuality. (Citing cases) . . .
>
> "It is doubtless true that libelants expected to ship their entire season's lumber by respondent's vessels and that they expected to have for shipment during the season about 15,000,000 of feet. The respondent doubtless shared in these expecta-

> tions and expected to carry for the libelant the amount of lumber named, but it is well said in Knox v. Lee, 12 Wall. 457, 20 L. Ed. 287, and quoted with approval in Maryland v. Railroad Company, 22 Wall. 105, 112, 22 L. Ed. 713, that
>
> > 'There is a well recognized distinction between the expectation of the parties to a contract, and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow.' "

We submit that if plaintiff had any continuing right to retain possession of defendant's railroad until all track work was completed, damages for the loss of that right must be limited to the value of the right as it would certainly have been enjoyed under the contract. What was done by defendant under entirely different circumstances, when it had terminated construction work and had engaged directly in the operation of its railroad, cannot serve as a measure. The trial court was in error in assuming that defendant would have been obligated to carry on the same activity, with plaintiff as its operating agency, if the alleged breach of contract had not occurred.

II.

BRIDGE MATERIAL CLAIM

First Summarized Assignment of Error

The District Court erred in holding and determining that the contract between the parties entitled plaintiff to the application of Price Items 37, 38 and 39, respectively, of the contract (R. pp. 59-60), instead of Price Item 72 (R. pp. 63-64), to the transportation of bridge materials by rail.

(The foregoing is a Summary of defendant's Assignments of Error Nos. XV, XVIII, XX, XXIII, and XXV, R. pp. 360-367. These Assignments are printed in full in the appendix to this brief.)

The provisions of the contract for the hauling of bridge materials related to the movement of these materials to bridge sites before the track was laid; and the prices specified for such hauling did not apply to transportation by railroad.

The question in dispute is whether or not plaintiff is entitled to the hauling prices specified in Items 37, 38, and 39, respectively, for the transportation of such of the bridge materials as were brought to the bridge sites by rail. Defendant paid at these rates for whatever was hauled by other means, but took the position that Price Item 72, fixing a car mile price for rail transportation service, applied whenever the track was laid to the bridge site in advance of the bridge con-

struction, and the material was handled by rail (R. pp. 262, 264, 267). The difference was quite substantial; under Price Item 72, plaintiff would get a total of $30 for hauling a car of bridge timbers 15 miles (and for returning the empty car), whereas Price Item 38 applied to the same quantity of bridge timbers for the same distance would entitle plaintiff to $191.25 (R. p. 265).

Plaintiff's claim to the higher prices rests upon the fact that Price Items 37, 38, and 39 described the work to be paid for as "Hauling" (R. pp. 59-60). Since the term was not limited in any way, plaintiff demanded that the prices stated in these three items be applied to all transportation of bridge materials, regardless of the means by which the transportation was accomplished.

But the question cannot turn alone upon the way in which the price items described the work. The specifications must be examined in order to ascertain just what "hauling" of bridge materials was intended; and both price items and specifications must be read with all other pertinent provisions of the contract.

Item 2 of the Specifications for Bridging indicates clearly that when the contract was executed, the parties had no thought of hauling bridge materials to the bridge sites by rail. This Item reads as follows (R. p. 108):

"2. Bridges must be erected ahead of the track in all cases but the maximum team haul of materials shall not exceed four miles, except on written orders of the Engineer."

For reasons which are in dispute and which are not of importance here, this program was not adhered to. There was much delay in the construction of many of the bridges and the track was down and rail transportation became available for much of the bridge material. But it is clear that as originally planned, the bridge construction was thought to require a considerable amount of extensive hauling, along the new grade or perhaps on makeshift roads, in order to assemble the bridge materials at the bridge sites.

Defendant contends that this, and not railroad transportation, was the service to be paid for at the "hauling prices" of the contract. Some movement by rail was of course intended, but this would not ordinarily include materials to be used in the construction of the line itself. For such rail transportation, a per car mile rate was quoted by Item 72 of the contract (R. pp. 63-64), which applied to "all commercial business, material and empty cars of the Company."

Plaintiff was not engaged primarily to do hauling work. Its undertaking was to build a railroad. In many instances, no additional compensation was allowed for hauling. This was true of bulkhead work

(Price Items 23 and 24, R. p. 58), timber and log work in culverts (Price Items 28 and 29, R. pp. 58-59), and timber work in pier cribs (Items 53 and 54, R. p. 61). In other cases, an allowance was made for hauling, the evident purpose being to provide additional compensation because the lack of inexpensive transportation facilities made the cost of assembling materials unduly burdensome.

This is the explanation of Price Items 35 to 41, inclusive (R. pp. 59-60). The hauling there referred to was required in the construction of culverts and in bridge construction and other work expected to be done before track could be laid and railroad transportation made available. The cost of the haul was too substantial to be covered by the unit prices fixed for the particular job in which the materials were to be used. Railroad transportation after track laying was on an entirely different footing. Where this was possible, the contractor was permitted to resort to it and for any such hauling, he was allowed $1 per car mile.

The scale of prices fixed for the two forms of transportation indicates that this was what was intended. Items 35 to 41, inclusive, specified prices per ton or thousand f. b. m. per mile, the particular price depending upon the varying cost of the transportation; it is obvious that there would be a wide difference in the cost of hauling by team or truck, as be-

tween bridge timbers and metal fastenings. On the other hand, Item 72, covering rail haul, fixed a price per car without regard to the commodity transported, since there would ordinarily be little difference in the cost of moving a car by rail, whether loaded with one commodity or another.

Plaintiff's contention that there was no distinction intended between rail haul and team haul (the latter term including truck or tractor haul, R. p. 265), and that the contractor was entitled to the hauling prices for both types of service, is negatived by the provisions of the bridge specifications to which we have already referred. Timber and piles furnished by the Railway Company were to be delivered at the Railway Company's material yard, and provision was made for payment to the contractor for hauling to the bridge sites, but there was the restriction that "the maximum team haul of materials shall not exceed four miles except on written orders of the Engineer." (R. p. 108).

This restriction indicates a clear intent to differentiate between team haul and rail haul. The specifications contemplated a program which required construction of all bridges ahead of the track. This meant that the bridge materials would be hauled by rail from the material yard to the end of track, and from that point on by any other means available. Because such "team haul" for substantial distances would be costly,

the contractor was not permitted to build the bridges more than four miles ahead of the track without special authority from the Engineer.

If plaintiff's contention is correct, and the prices for hauling were applicable alike to team haul and rail haul, the restriction of four miles for team haul would be meaningless. It can be given effect only upon the assumption that "team haul" as used in the specification referred to, and "hauling" as used in the Price Items, were identical and were not intended to include rail haul.

The trial court recognized this difficulty but held that in result the word "hauling" in the Price Items was ambiguous. Resort was had to testimony which the Court thought sufficient to show that the term was intended to cover both kinds of transportation (R. pp. 340-341).

This conclusion is not warranted by the record. The testimony referred to was given by plaintiff's Superintendent concerning a change made by defendant's Chief Engineer in the wording of two price items just after plaintiff had been awarded the job. According to this witness, Items 35 and 36 of the bid sheet furnished plaintiff provided for "team haul" of concrete pipe and corrugated iron pipe, whereas other price items referred merely to "hauling." In

the discussion of the work with Chief Engineer Stevens, plaintiff's Superintendent says that he called attention to the fact that only in Items 35 and 36 was "team haul" called for, whereupon Mr. Stevens agreed to change, and did change, these two items to eliminate the word "team" (R. p. 259).

Defendant's testimony (Witness Stevens, R. p. 265) disputed the statement that this change was made at the suggestion of plaintiff's Superintendent. It was explained by the witness Stevens that the term "team haul" is now virtually obsolete, since hauling is done largely by trucks and tractors, and that he made the change on his own initiative merely to harmonize Items 35 and 36 with the other price items (R. pp. 265, 268).

But if plaintiff's version is to be accepted here (although there was no special finding on the subject), the testimony establishes nothing more than the fact of the change at the instance of plaintiff's Superintendent. If his purpose was to have it understood that the haul might be "by rail, truck or otherwise," as he stated upon cross-examination (R. p. 261), that purpose was not made known to defendant's Chief Engineer. In result this testimony discloses nothing as to the intent of the parties in the use of the word "hauling" in the price items.

Plaintiff's witness upon this point sought to strengthen his position by the assertion that plaintiff had hauled "lots of corrugated pipe by truck, team, *and rail,*" and had been paid the hauling price for it all (R. pp. 259-260). But upon cross-examination he could recall only a very few isolated instances of rail haul, where tracklaying reached the culvert site before the contractor was able to get the pipe in. It was admitted that ordinarily all the culvert work would be done as the grade was built, long before the time of tracklaying (R. p. 261).

We submit that the provisions of the contract allowing additional compensation for assembling materials, including those specifically applicable to bridge materials, were intended to cover hauling service incidental to the construction of the railroad and not transportation upon the railroad after it was built. Plaintiff has been paid for its rail haul of bridge materials at the rates properly applicable to that service and is not entitled to recover anything additional.

BRIDGE MATERIAL HAUL

Second Summarized Assignment of Error

The District Court erred in holding and determining that the question of the rate applicable to the haul of bridge materials was not a matter for sub-

mission to the Chief Engineer of defendant under the arbitration clause of the contract and in holding and determining that defendant's action in refusing to pay the prices claimed by plaintiff was not based upon or pursuant to a decision by the Chief Engineer under said arbitration clause of the contract.

(The foregoing is a summary of defendant's Assignments of Error Nos. XVI, XVII, XIX, XXI, XXII, and XXIV, R. pp. 361-366. These Assignments are printed in full in the appendix to this brief.)

POINT 1

Arbitration clauses in construction contracts delegating to an engineer or architect of the owner the power to decide questions in dispute between the parties, including questions of interpretation of the contract, are valid and enforceable.

The contract between plaintiff and defendant had the following arbitration clause (R. pp. 55-56):

> "To prevent disputes and misunderstandings between the parties and to provide for the speedy settlement of such as may occur in relation to the provisions of this agreement, or the true intent and meaning hereof, or the manner of performance by either party, the Chief Engineer of the Company is made the umpire to decide all such differences; he shall also decide the amount and quantity, character and kind of work done and materials furnished by the Contractor,

> including all extra work and material; and his decision shall be final and conclusive on the parties."

While the work was in progress plaintiff demanded payment for all transportation of bridge materials at the prices stated in Price Items 37, 38, and 39 of the contract. The Assistant Engineer, upon whom the demand was made, at once referred the question to the Chief Engineer for a ruling, notifying plaintiff that this had been done (R. pp. 269-270). The Chief Engineer thereupon wrote the Assistant Engineer, sending a copy to plaintiff, as follows (R. pp. 270-271):

> "Your letter of August 9th with copy of letter from Mr. Boss requesting payment on basis of team haul for material used in the Whiskey Creek Bridge.
>
> Mr. James Twohy called on me last week and I advised him that we would be glad to pay team haul for such material as was actually hauled by team and that for material hauled by train we would pay train haul as covered by item 72 of contract. You will further note there is a 4 mile limitation on the team haul item.
>
> I think it was thoroughly understood, both by the contractors and ourselves, how these clauses of the contract were to be interpreted and see no reason for raising the question at this time."

Thereupon plaintiff's secretary, in charge of the

work, wrote defendant's Chief Engineer as follows (R. pp. 196-198):

> "I have been somewhat troubled about our brief and rather hurried discussion in your office on Friday, on the subject of a hauling price on bridge material, and also on the subject of operating the line between June 1st, and Sept. 1st, hence this personal word to make my position quite clear. . . .
>
> Under its (the contract's) letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretive complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including those two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the general principle governing all of us and underlying the whole contract."

The District Court held in its findings and conclusions and in denying defendant's motion for the adoption of requested findings and conclusions (R. pp. 171, 251-254) that the dispute over the rates applicable to the haul of bridge materials was not one which could be submitted to the Chief Engineer under the arbitration clause of the contract. This decision defendant believes to be contrary to the set-

tled rule in the courts of the United States. The right of contracting parties to bind themselves to submit anticipated disputes to an arbitrator or umpire, even though the person named is an officer or representative of one of the contracting parties, is too well settled by decisions of the Supreme Court and of Circuit and District Courts to be questioned here.

Ever since *Kihlberg v. U. S.*, 97 U. S. 398, provisions of this kind have been given the full breadth of operation contemplated by the language used. The distinction attempted to be made by some state courts which have upheld arbitration clauses as to questions of fact but not as to questions of law has not been accepted in the federal courts. The delegation of power to an architect or an engineer to settle questions of interpretation of a contract as well as disputes of fact as to classification of materials and the like has uniformly been approved and enforced.

There is a comprehensive review of the decisions of the Supreme Court and of other federal courts upon this question in *McCullough v. Clinch-Mitchell Construction Co.*, 71 Fed. (2d) 17, a decision of the Circuit Court of Appeals for the Eighth Circuit. The Court, referring to arbitration clauses such as that here involved, said:

"Such stipulations are evoked out of the experi-

ence of railroad companies in such construction work. From its very nature, extending over a long line of road, with diversified topography of country, encountering many varieties of geological formation, and difficulties impossible of anticipation, the variant views and notions of contractors and subcontractors respecting the infinite details of the work, the classification and measurement of material, the prevention of incessant wrangles over the work, with its annoyances and litigation, justified the railroad company in requiring, as a condition precedent to letting the construction of this work, the acceptance of the foregoing provisions of the contract." (Citing cases.) . . . "As said in United States v. Gleason, 175 U. S. 588, 602, '. . . It is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.' "

Other decisions of the Supreme Court stating this rule, in addition to *U. S. v. Gleason* referred to in the decision just quoted are *U. S. v. Mason & Hanger Co.*, 260 U. S. 323, *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185; *Ripley v. U. S.*, 223 U. S. 695, *Plumley v. U. S.*, 226 U. S. 545, and *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387.

Many decisions of circuit courts and district courts could be cited illustrating the application of the rule. See, for example, *Memphis Trust Co. et al. v. Brown-Ketchum Iron Works*, 166 Fed. 398, *Kennedy v. City of White Bear Lake*, 39 Fed. (2d) 608, *Penn Bridge Co. v. Kershaw County*, 226 Fed. 728, *Corporation of Charles Town v. Ligon*, 67 Fed. (2d) 238.

The trial court in the case at bar took the position that interpretation of the contract was a question of law which could not be submitted to the Chief Engineer as umpire under the arbitration clause of the contract (R. p. 338); this notwithstanding the conclusion that the inconsistency between the price items and the bridging specifications which we have heretofore discussed effected "an ambiguity upon the word 'hauling'" (R. p. 340).

This is squarely in conflict with the decision of the Supreme Court in *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387. In that case the question submitted to and decided by the supervising architect was one of contract interpretation, in every respect as much a question of law as that here involved. The Court in upholding the power of the architect to finally dispose of the question, said:

> "If we may concede to appellant an ambiguity in the specifications, arising from the use of the

> singular word 'building,' instead of the plural word 'buildings,' . . . at the utmost it could only be said that there was ground for dispute, and, under the contract, the decision of the architect upon the dispute was final."

See also *Smith v. Copiah County*, 239 Fed. 425, in which the meaning of the word "overhaul" was determined by the engineer under the terms of a clause leaving questions of contract interpretation to him.

We submit that the trial court plainly erred in refusing to give effect to the decision of defendant's Chief Engineer, upon the theory that the dispute as to the applicability of the hauling prices to rail transportation was not a question which could be submitted to or decided by the engineer.

POINT 2

Formal notice and a hearing were not essential to the validity of a ruling by defendant's Chief Engineer upon a question of contract interpretation. The dispute as to the meaning of the term "hauling" was in fact submitted to the Engineer, plaintiff was notified of the submission, and had an opportunity to be heard, after which the Engineer announced his decision, which was thereupon accepted by plaintiff.

Plaintiff's reply asserted that any decision of the Chief Engineer upon the dispute over prices applicable to rail transportation of bridge material is of no effect, first, because there were no formal arbi-

tration proceedings, and, second, because the Engineer did not exercise an impartial or an honest or independent judgment upon the question (R. pp. 155-157). The trial court held (although the ruling is incorporated in a finding and not in a conclusion of law) that there was no submission to the Chief Engineer under the contract, and that defendant's refusal to pay the prices demanded by plaintiff was not "pursuant to the arbitration clause of the contract, but constituted an arbitrary exercise of an assumed power" (R. p. 171).

Since the facts are not in dispute, it seems necessary to go to the trial court's opinion to ascertain what was meant by this finding, and particularly whether it was a determination of a fact issue, or instead, a conclusion as to the legal effect of what had been done. Upon the question of arbitration of the "hauling" dispute, the trial court said (R. p. 341):

> "The questions as to whether there was submission for arbitration, whether a law question could be so submitted, whether the Engineer acted under this submission, or whether any decision by the Engineer could stand considering this attitude in these particular claims, have been adequately discussed and are decided in favor of the plaintiff."

In the statement that these questions had already

been adequately discussed, the Court referred to what had theretofore been said in its decision that there had been no effective arbitration of the dispute over the right to handle log traffic as "commercial haul" under the contract (R. pp. 338-339). While this contention had been advanced in defendant's affirmative answer (R. p. 49), it was not pressed thereafter, and was not included in defendant's Requested Findings (R. pp. 179-184). The trial court assumed that it was still an issue in the case and passed upon it, and in doing so, held that the Chief Engineer, after fortifying himself with an opinion from defendant's counsel, had acted arbitrarily in forcing plaintiff to give up the log haul, and that this was constructive fraud (R. p. 339).

Defendant did not contend in the Court below, and does not now contend, that there was any evidence of a submission of the commercial haul question to the Chief Engineer under the arbitration clause of the contract. We make this explanation here because the trial court's opinion seemed to confuse the question of arbitration of the bridge material question with the supposed log haul arbitration issue, and particularly because the Court's strictures upon the attitude and actions of the Chief Engineer can have no possible reference to what was done in passing

upon the dispute over the rate applicable to the haul of bridge materials. This question was submitted by letter to the Chief Engineer after plaintiff had presented its claim in writing. The matter was discussed with plaintiff's Secretary, and a decision as to the meaning of the contract was thereupon made, in which decision plaintiff's Secretary thereafter acquiesced (R. pp. 269-271, 196-198).

We assume, therefore, that the question passed upon by the trial court, (in rejecting defendant's contention that this particular dispute had been arbitrated), is whether the steps taken amounted in legal effect to a submission of the matter under the arbitration clause of the contract. There were no formal arbitration proceedings. No formal hearing was held, and plaintiff was given no advance notice of the time when the Chief Engineer would take up and dispose of the question in dispute. The trial court apparently thought this necessary; it must be assumed from the two parts of the opinion to which we have referred that the Engineer's decision was held ineffective because of the lack of formal notice and hearing (R. pp. 338, 341).

This view overlooks the fact that the stipulation for determination of disputes by the Chief Engineer, while appearing in the contract under the heading

"Arbitration" (R. p. 55), makes no provision for arbitration proceedings, if by that term is meant a formal hearing or hearings after notice to the parties. The agreement of the parties was simply that the Chief Engineer of defendant should have the power of decision upon all disputes arising in the performance of the work, whether as to the meaning of a contract term or as to the quantity or quality of the work done, or as to any other disagreement between the parties with relation to the work.

Stipulations of this kind, whether called "arbitration" clauses or not, have been literally enforced in the Federal Courts ever since *Kihlberg v. U. S.*, 97 U. S. 398 and *U. S. v. Gleason*, 175 U. S. 588. Decisions of engineers and architects made on the job, with never a thought of formal arbitration proceedings, have been held final and conclusive because the parties had stipulated that this should be so. Many cases involve disagreements as to the classification of materials excavated. The engineer examines the material and makes his decision. He does not conduct a formal arbitration; he personally settles, in the speedy manner contemplated by the contract, the dispute which has arisen. Formal arbitration proceedings would be entirely impracticable; they would defeat the expressed purpose to provide for a speedy

settlement of disputes arising in the performance of the work.

Examination of the many cases in which clauses of this kind have been upheld will disclose that almost always the decision of the engineer or architect was made informally and without resort to anything like a formal arbitration. In *U. S. v. Gleason*, 175 U. S. 588, the engineer disallowed the contractor's demand for an extension of time. In *Chicago, Santa Fe & C. R. Co. v. Price*, 138 U. S. 185, the decision reviewed was the engineer's estimate of quantities excavated. In *Penn Bridge Co. v. Kershaw County*, 226 Fed. 729, the "decision" upheld was simply the engineer's certificate as to the quantity and quality of the work done.

Illustrations could be multiplied. In the great majority of cases there is no reference to formal arbitration; the decision of the engineer, or architect, however made, is enforced unless he has failed to exercise an honest judgment upon the question in dispute.

It is significant that in the many cases involving these so-called arbitration clauses in construction contracts, the question of notice and hearing has rarely been raised. It is said in 9 Corpus Juris, 770, that notice and hearing are necessary, but the three cases cited as authority have been overruled by later de-

cisions. Two of them are early New York decisions which are contrary to a later New York case, *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, and the other is an Illinois case which was specifically overruled by *Corf v. Lull*, 70 Ill. 420. The *Sweet-Morrison* case considered the question at length and came to the conclusion that a formal arbitration proceeding would be altogether inconsistent with the purpose of the stipulation, and could not be required. We quote from the opinion:

> ". . . The only reason appearing in the findings or suggested by the evidence for thus disturbing that which the parties had expressly stipulated should be final is that the chief engineer did not personally measure the work, and that when the final estimate was about to be signed he refused to allow the plaintiffs to call a witness to contradict the statements already made to him by the subordinate engineers. This involves an inquiry into the nature of the power intrusted to the chief engineer. Was he an arbitrator, as that term is understood at common law, or was it his duty in estimating quantities to simply make a summary computation, as held by the learned general term? The answer to this question must be found in the contract, which is both the source and limit of the power under consideration. . . .
>
> . . . Was it the duty of the chief engineer to hear evidence? We have already held that the

> nature of his trust was such as to permit him to rely upon the reports of his subordinates in making his estimate. The same reasoning which led us to that conclusion applies with equal force as an answer to this question. Did the parties expect him to try a lawsuit? For, if the door is opened to admit one witness, why should not all who know anything about the matter be allowed to come in? And what would this involve? . . . Did the parties expect that a man charged with the responsibility of building a great railroad could stop long enough to enter upon an investigation, through witnesses called and sworn, with such possibilities? To ask this question is to answer it. We think that it was the intention of the parties to clothe the chief engineer with the power of summary computation, based upon his experience in building railroads, his general knowledge of this road, the original surveys, measurements, plans, specifications, and such other *data* as would be presumed to be in his possession, but chiefly upon the reports of the skilled engineers working under him. It thus became his duty to exercise his judgment upon all the facts thus ascertained, and to fairly make the estimate. There was no delegation of authority, further than was impliedly authorized by the contract. Wiberly v. Matthews, 91 N. Y. 648; Billing, Awards, 76, 77."

The same conclusion was reached in *Norcross v. Wyman,* 187 Mass. 25, 72 N. E. 347, where the Court said:

". . . In the practical working of this plan of supervision and adjustment of differences the cumbersome formalities of a notice to or a hearing of the parties before making decision were evidently not contemplated, as such a requirement is not found in any provision of the contract. Neither was it required by the character of the undertaking. For the purposes of their decision they (the architects) were free to adopt such legal principles as they honestly believed applicable, and to act on such evidence as they chose to receive. . . ."

Other cases to the same effect are *Heidlinger v. Onward Construction Co.*, 90 N. Y. Supp. 115 (affirmed without opinion, 188 N. Y. 572, 80 N. E. 1114), and *State v. Equitable Surety Co.*, 140 Minn. 48, 167 N. W. 292.

As these decisions indicate, parties to construction contracts may, if they desire, stipulate that disputes in the performance of the work may be left for decision to an engineer or architect of the owner; whether correctly termed an "arbitration" or not, the exercise of this function by the party designated does not require notice and hearing or any of the formalities of an arbitration proceeding. Such a proceeding would be unworkable and impracticable in most in-

stances. Contract provisions such as that here involved, which contemplate nothing more than a good faith decision of the engineer or architect, are to be enforced as written.

What has been said assumes that the statement in the findings of the trial court that defendant's refusal "to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power" (R. p. 171), was intended as a conclusion that the Engineer, in undertaking to decide the dispute, had acted beyond his powers under the contract, and not as a finding that he had exercised the power wrongfully or had been guilty of constructive fraud. The reply pleads that there was constructive fraud, however, and if it is to be urged that the finding so held, we point to the fact that there is nothing in the record to support such a finding. The trial court should have granted defendant's motion for a conclusion of law to this effect (R. p. 254).

According to plaintiff's witness Twohy, Chief Engineer Stevens displayed impatience and irritation at his (Twohy's) suggestion that the contract would con-

trol upon both the commercial haul and bridge material questions (R. pp. 195-196). Mr. Stevens says he was merely emphatic (R. pp. 234, 264). Which of the two questions aroused the irritation, if any, does not appear. Assuming it to have been directed toward the bridge material contention advanced by plaintiff, it falls far short of establishing the constructive fraud charged; and there is nothing else in the record to suggest that the question of contract interpretation involved was not fairly and honestly decided.

We submit that the dispute over the interpretation to be given the contract provisions relating to the haul of bridge materials was submitted to and decided by the Chief Engineer in the manner contemplated by the contract. His decision was in fact accepted at the time by plaintiff (R. p. 197); but whether accepted or not, the contract provision making it final and conclusive should have been given effect by the trial court.

CONCLUSION

Appellant believes that the commercial haul theory advanced by plaintiff and accepted by the trial court, —that there was a contract right to operate freight trains for defendant after construction work had ended, and that defendant could not terminate or shorten the construction work in order to make use of its property,—is contrary to the plain intent of the contract. Plaintiff was obligated, and was entitled, to include in its work trains, while its construction work continued, all commercial freight accepted for transportation by defendant, but defendant retained the right to determine for itself when the road was ready for the transportation service for which it was built. The exercise of that right was not a breach of the construction contract.

Appellant further maintains that it paid plaintiff for its service in hauling bridge materials at the contract rate properly applicable thereto, and that if the contract was ambiguous in this respect, the decision of its Chief Engineer against the contention of plaintiff is final and conclusive.

Appellant submits that the judgment of the Dis-

trict Court should be reversed and that judgment should be entered in favor of plaintiff for the sum of $8865.75, with interest from February 13, 1930, less defendant's costs upon this appeal.

CHARLES A. HART,
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L. B. DAPONTE,
CAREY, HART, SPENCER & MCCULLOCH,
Of Counsel for Appellant.

APPENDIX

DEFENDANT'S ASSIGNMENTS OF ERROR

Now comes defendant herein and in connection with its petition for an order allowing an appeal in this cause, assigns the following errors which defendant avers occurred on the trial of the cause and upon which defendant relies to reverse the judgment entered herein as appears of record:

(Assignments I to XIV, inclusive, relate to ruling interpreting contract to give plaintiff the right to conduct operations on the railroad to be constructed.)

I.

The District Court erred in ruling that the contract between the parties, dated October 15, 1925, for the construction of the so-called Orofino Branch of defendant's railroad, gave plaintiff the right to retain possession of the newly constructed line and to conduct all commercial operations thereon, until the date fixed by the contract for completion of the work contracted for. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its [292] Requested Findings of Fact Nos. XV, XVI and XVII, respectively, and in the

making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, required and permitted plaintiff to conduct transportation operations on the railroad, as constructed, only in its work trains as called upon to do so by defendant, as an incident to the construction work, and did not prevent defendant from taking over and making use of any part of its railroad whenever it was deemed ready for such use.

II.

The District Court erred in ruling that the contract between the parties denied defendant the right to take over and use any part of the railroad to be constructed, in advance of the date specified in the contract for completion of construction, whenever defendant deemed such part to be sufficiently completed for use. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II. III, IV and V, respectively, and for the entry of its Requested Findings of Fact Nos. XV, XVI, and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and

is erroneous in that the contract, correctly interpreted, permitted defendant to use its property as soon as it deemed said property to be ready for use.

III.

The District Court erred in ruling that the contract between the parties did not permit defendant to take possession of and to use any part of the railroad to be constructed, by reason of the provisions of the contract authorizing defendant [293] to stop work or any part thereof or to change the amount of work to be done under the contract. Said ruling was made in the Court's order denying defendant's motion to make and adopt its Requested Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, gave defendant the right to stop any part of the work required of plaintiff; or to change the amount of work to be done by plaintiff under the contract.

IV.

The District Court erred in ruling that plaintiff is entitled to recover damages from defendant for loss of opportunity to conduct transportation operations on said railroad, measured by the volume

of business actually done by defendant. Said ruling was made in the Court's order denying defendant's motion to adopt its Requested Conclusion of Law No. IV and in the making and adopting of Finding of Fact No. XVIII and Conclusion of Law No. II, and is erroneous in that defendant was not legally obligated to accept any commercial traffic, and the volume actually handled by defendant cannot be taken as the measure of what would have been accepted for transportation, if plaintiff had been permitted to remain in possession of the part of the railroad taken over by defendant.

V.

The District Court erred in holding and determining that defendant, in taking over and operating in commercial log haul transportation, between July 17, 1927, and September 1, 1927, the first 29 miles of the railroad constructed under the terms of the contract between the parties, breached its obligations under said contract. Said holding and determina- [294] tion was made in the making and adoption of Finding of Fact Nos. XV and XVIII, respectively, and Conclusion of Law No. II, and in the order denying defendant's motion to make and adopt its Requested Finding of Fact No. XVI

and Conclusions of Law Nos. II, III, IV and V, respectively, and is erroneous in that the contract between the parties, correctly interpreted, gave defendant the right to take possession of and use said portion of said railroad, at the time such possession was taken.

VI.

The District Court erred in making and adopting the following "Finding of Fact" in that said Finding misinterpreted the contract between the parties, as specified in the foregoing assignments of error Nos. I, II and V, respectively:

"XV

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of $10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log

tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

'NORTHERN PACIFIC RAILWAY COMPANY

Engineering Department
St. Paul, Minn. July 8, 1927.
[295]

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.
Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. Stevens'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

'NORTHERN PACIFIC RAILWAY COMPANY

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.
Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and [296]) other ma-

terial required for the completion of your contract.

Yours truly,

H. M. Tremaine,
Assistant Engineer.'

This was answered by Twohy Brothers as follows:

'Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,

By '

The defendant did take possession of that portion of the road mentioned in the defend-

ant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do [297] it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927."

VII.

The District Court erred in adopting the following Conclusions of Law in that said Conclusions misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in

the foregoing Assignments of Error Nos. I, II, III, IV and V, respectively:

"II

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of with interest thereon at six per cent per annum from February 13, 1930	$ 8,865.75
On the commercial haul, the sum of without interest prior to judgment.	125,000.00

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	$26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69

without interest prior to judgment." [298]

"III

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred."

VIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XV

Under the terms of the construction contract, plaintiff was required to complete ballasting and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part

of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

IX.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVI

Defendant made no commitment of any kind to [299] anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

X.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVII

Plaintiff, during the negotiations leading up to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of $1.00 per car mile therefor."

XI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion:

"II

Plaintiff was not entitled, under its contract with defendant, to retain possession of any

[300] part of defendant's branch line of railroad, after tracklaying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof."

XII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after track-laying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time."

XIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following

Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor."

[301]

XIV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"V

Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover upon its claim for damages for alleged breach of contract in this particular."

(Assignments XV to XXV, inclusive, relate to decision interpreting contract as to prices payable for transportation of timbers, piling, and bridge metals.)

XV.

The District Court erred in ruling that the contract between the parties entitled plaintiff to payment at the rates specified in Price Item 37 (2 cents per lineal foot per mile), Price Item 38 (85 cents per M per mile), and Price Item 39 (65 cents per ton per mile), of the contract for the haul of piling, timber and metal fastenings, respectively, which were in fact transported by rail. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VI, and in the making and adoption of Finding of Fact No. XIX and Conclusions of Law Nos. II and III, respectively, and is erroneous in that the contract, correctly interpreted,

makes said prices applicable to piling, timbers, and metal fasten- [302] ings hauled otherwise than by rail.

XVI.

The District Court erred in ruling that the question in dispute between the parties, as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, respectively, was not a matter for submission to the chief engineer under the arbitration clause of the contract. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX, and is erroneous in that the contract, properly interpreted, made such a dispute a matter to be submitted to and decided by said chief engineer.

XVII.

The District Court erred in holding and determining that the question in dispute between the parties as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, was not submitted to the chief engineer or decided by him under the arbitration clause of the contract. Said holding and determination was made in the

Court's order denying defendant's motion for the adoption of its Requested Finding of Fact No. XVIII and Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX and Conclusion of Law No. II, and is erroneous in that the submission of said dispute to said chief engineer and the decision thereof by him were established by uncontradicted written evidence.

XVIII.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinter- [303] preted the contract between the parties, as specified in the foregoing Assignment of Error No. XV:

"XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile	$ .02
Hauling timber furnished by the company per thousand feet b.m. mile	.85
Hauling metal fastenings per ton mile	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for

hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount, leaving unpaid and due to plaintiff on this item $26,-843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid $5353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item $4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2563.31. The defendant has paid but $1313.62 of this amount, leaving unpaid and due the plaintiff on this item $1249.69."

XIX.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XVI and XVII, respectively:

"XX

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX

was not submitted to the chief engineer for decision, was [304] not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

XX.

The District Court erred in adopting the following Conclusion of Law in that said Conclusion misinterpreted the contract and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XV, XVI, and XVII, respectively:

"II

Defendant breached its contract by * * * refusing to pay the plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, * * * Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers	$26,843.47
For hauling piling	4,693.29
For hauling bridge metals	1,249.69

without interest prior to judgment."

XXI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony: [305]

"XVIII

During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber and piles and metal fastenings described in the complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of $1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of $1.00 per car mile."

XXII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony:

"XIX

After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

XXIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion: [308]

"VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term 'team haul' as used in the contract

meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track."

XXIV.

The District Court erred in denying defendant's motion made before final submission of the cause, for an order adopting the following Requested Conclusion of Law in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute."

XXV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order adopting the following Requested Conclusion of Law, in that said Conclusion was required by the contract, properly interpreted, the

facts admitted by the pleadings, and the uncontradicted testimony:

"VIII

Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials." [307]

XXVI.

The District Court erred in making and adopting the following Finding of Fact, holding and determining that defendant breached its contract in failing to render a final estimate at the conclusion of the work, in that said holding and determination is contrary to the uncontradicted testimony:

"XXII

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required."

No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant and Cross-Appellee,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee and Cross-Appellant.

Upon Appeal from the United States District Court for the District of Oregon

ANSWERING BRIEF OF CROSS-APPELLEE

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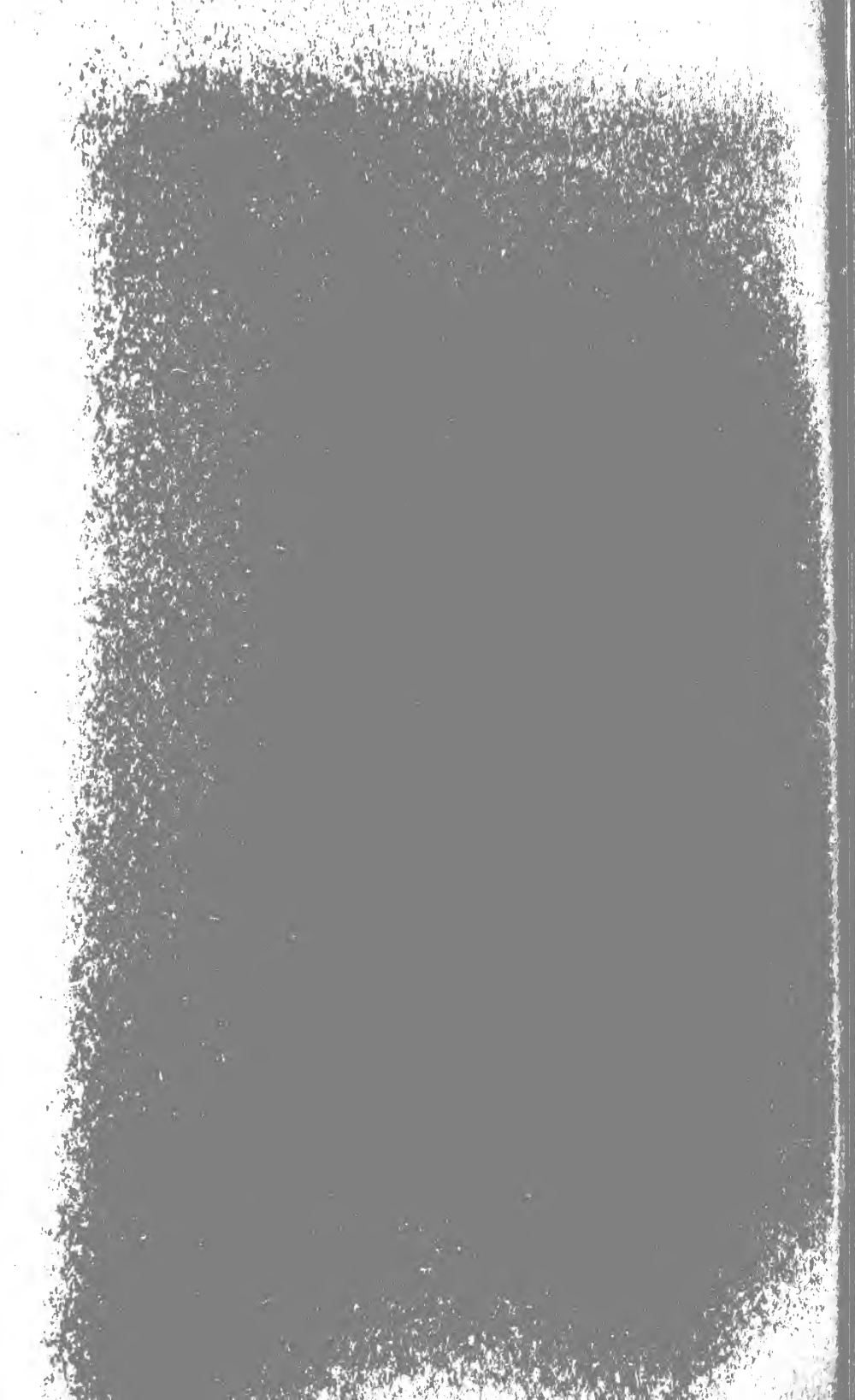

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No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant and Cross-Appellee,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee and Cross-Appellant.

Upon Appeal from the United States District Court for the District of Oregon

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ANSWERING BRIEF OF CROSS-APPELLEE

JURISDICTION

The jurisdictional requisites both in the District Court and in this Court were set out fully in appellant's brief, upon its own direct appeal, and we assume need not be restated here.

STATEMENT OF THE CASE

(To avoid confusion, the parties will be referred to as plaintiff and defendant, respectively, as they appeared in the Court below. Twohy Brothers Company, appellee and cross-appellant, was plaintiff, and Northern Pacific Railway Company, appellant and cross-appellee, was defendant.)

Plaintiff's opening brief, in support of its cross-appeal, begins with what is termed a "statement." (Cross-Appellant's Opening Brief, p. 2.) If this is intended as the statement of the case required by Rule 1 (c), we cannot accept it as an adequate or fair explanation of the litigation.

The references made to the record will show that to a considerable extent what appear as statements of fact are in truth contentions as to which some evidence was introduced. Plaintiff's bill of exceptions made no attempt to include the evidence, in condensed and narrative form, upon which the trial court acted in disposing of these contentions. For the most part, plaintiff thought it sufficient merely to indicate by its bill of exceptions that there was some evidence tending to prove what it claimed (R. pp. 286-290, 298-311).

This form of stating the evidence was defended in the Court below upon the ground that where the

error claimed went merely to the rejection of testimony, it was only necessary to show, in the bill of exceptions, that there was some evidence in the record tending to establish the contentions as to which the rejected testimony was thought to be relevant.

If plaintiff's bill of exceptions is sufficient for this purpose, its recitals of what the evidence tended to show should be understood as such. They are not available in support of the other three points discussed in the brief (Cross-Appellant's Opening Brief, pp. 6-8); and since, in large part, they give but one side of sharply disputed issues of fact, they are not well adapted to an explanation the purpose of which is to make clear what these issues are and what questions they present.

An explanation of the issues made by the pleadings in the case, of the disposition of them by the trial court, and of the questions here involved, as presented by defendant's appeal, appears in the brief heretofore filed on behalf of defendant (Brief of Appellant, pp. 3-15). We supplement this with an explanation of the questions sought to be raised upon plaintiff's cross-appeal.

I. Change of Work Claim

Much evidence was offered upon the different questions involved in this claim at the hearing upon the reference to an Auditor. Objections to testimony were noted but not passed upon. At the trial in the District Court the parties presented no additional testimony; the evidence given by each witness before the Auditor was introduced, but because of the length of the transcript, the testimony was not in fact read, the parties stipulating that all objections made before the Auditor should be considered as made at the trial, the Court to pass upon them when deciding the case (R. pp. 178-179).

The District Court held that plaintiff was not entitled to recover upon the change of work claim. Special findings were made against plaintiff's contentions upon the questions of fact involved (R. pp. 159-164). No formal rulings were made upon any question of admitting or rejecting testimony (R. pp. 159-173).

Plaintiff's contention here is that the Court's decision included a ruling which rejected certain evidence "as representations of the amount and character of the work to be done by the contractor," and that this ruling was erroneous (R. p. 291).

II. Commercial Haul Claim—Duration of Contract

The District Court interpreted the contract as entitling plaintiff to conduct the transportation operations involved in the moving of the log traffic which defendant handled from the time it took possession of the first 29 miles of the line until the date specified in the construction contract for the completion of the work; and the Court concluded that defendant's action in handling this traffic itself was a breach of the contract (R. pp. 164-168).

Plaintiff's work on the remainder of the line continued until October 25, 1927. The contention here made is that the District Court erred in holding that no issue was made by the pleadings as to whether anything done by defendant operated to extend the period for commercial haul, beyond the contract date, September 1, 1927 (R. pp. 169-170, 377-382).

III. Commercial Haul Claim—Allowance of Interest

The District Court found that plaintiff was damaged in the sum of $125,000 as the result of the alleged breach of contract between July 17, 1927, and September 1, 1927. Upon this finding the Court awarded plaintiff the sum of $125,000 without interest prior to judgment (R. p. 173).

The contention here made is that the District Court erred in not including interest from February 1, 1928, upon the award of $125,000 for the alleged breach of contract (R. pp. 322, 324, 383-384).

IV. Bridge Material Claim

The District Court interpreted the contract as entitling plaintiff to payment for hauling bridge materials, whether transported by rail or otherwise, at the prices specified for hauling by Items 37, 38, and 39 of the contract, and that the refusal to pay at these rates was a breach of the contract (R. pp. 170-171). As damages, the Court awarded what would have been payable at these rates for all the material transported, less what had been actually paid by defendant, without interest prior to judgment (R. p. 173).

Plaintiff's contention here is that interest from February 1, 1928, upon the award made for the alleged breach of contract, should have been included (R. pp. 327, 384-385).

ARGUMENT

I

CHANGE OF WORK CLAIM

1. *Plaintiff's Assignment of Error No. I presents no question for review here because plaintiff seeks no relief with respect to the judgment of the District Court upon the Change of Work claim.*

Plaintiff's Assignment of Error No. I asserts that the District Court erred in refusing to receive certain testimony. It is said in the Assignment that the Court "qualifiedly sustained the objections to plaintiff's offers of the letter of invitation (from the Railway Company to prospective bidders), the Chamberlin profile and the description of the proposed line;" (R. pp. 376-377). And plaintiff's brief explains, as to this Assignment, that "only the admissibility of evidence of the job upon which plaintiff bid," is to be discussed. (Cross-Appellant's Opening Brief, p. 10.)

Plaintiff excepted to each of the special findings of the District Court which determined that plaintiff had failed to prove the allegations of its complaint as to the change of work claim. Exceptions were also taken to the refusal to make requested findings and conclusions which would have determined the merits of this claim in plaintiff's favor (R. pp. 291-317). But the assignment of error upon which plaintiff

comes to this Court does not challenge the correctness of the findings entered or of the conclusion that plaintiff is not entitled to recover. The assignment is limited to the alleged error in refusing to receive and consider certain testimony.

As we shall presently point out, there was no such ruling by the District Court, and there is no basis for the exception taken or for the assignment here relied upon. But if the District Court had in fact excluded competent evidence, what does plaintiff think this Court should do about it? Error in refusing to admit competent testimony in an action at law may warrant reversing the judgment of the trial court, and may entitle the aggrieved party to a retrial of the cause. If that is the purpose of plaintiff's cross-appeal, defendant will join it in requesting this Court to set aside the judgment entered in the District Court.

Plaintiff of course was careful to make no such request. In attempting to comply with the statutory requisite for a prayer for reversal (28 U. S. Code Ann. Sec. 862), plaintiff concluded its Assignments of Error thus (R. p. 386):

> "Wherefore appellant prays that the judgment of said District Court of the United States

> for the District of Oregon be reversed insofar as it refused to award judgment as prayed in plaintiff's complaint."

We do not stop here to inquire whether a cross-appeal will ever lie in an action at law where the cross-appellant seeks to amend rather than to set aside the judgment of the trial court,—whether a party appealing has a right "to hold onto his present recovery, and, without jeopardizing that, to try to increase it." *Empire Fuel Co. v. Lyons*, 257 Fed. 890, 898. As to plaintiff's Assignments other than Assignment No. I, the prayer for reversal above quoted is at least understandable; plaintiff seeks to have this Court, upon the record before it, increase the amount awarded by the judgment of the District Court.

This is not true of Assignment No. I. This assignment asserts merely that the District Court should have received and considered certain evidence which might have influenced the Court to decide the change of work claim differently. If this Court were to so determine, what is plaintiff's remedy? A number of questions of fact are involved. If we indulge in the unwarranted assumption that the excluded evidence should have induced a finding that the work contracted for was changed, what was the effect of that

change? If it was increased, was the additional volume, paid for on a unit price basis, advantageous or disadvantageous to the contractor? Did the Engineer make any finding on the subject, as required by the contract, and finally, if plaintiff's rights were infringed, what are the damages to which it is entitled?

Plaintiff's bill of exceptions does not profess to include the evidence upon which the District Court determined these fact issues against it (R. p. 344); and its brief makes no claim that the District Court's findings are to be reviewed here. (Cross-Appellant's Opening Brief, pp. 9-17, 41.) There is nothing in the Assignment itself or in the argument made in its support, to suggest that any action is expected of this Court, if it should find the Assignment well taken. We submit, therefore, that the Assignment presents nothing for the consideration of this Court.

2. *Plaintiff's Assignment of Error No. I presents no question for review here because the record shows that the ruling complained of was not in fact made by the District Court.*

As already explained, there were no witnesses in attendance when the case was tried in the District Court. Both sides submitted the testimony as given by their respective witnesses at the hearing before the Auditor in 1930. The transcript of this testimony

was on file with the Auditor's report, and the parties offered the evidence given by each witness as it appeared in the transcript, stipulating that all objections there noted should be considered as made at the trial, the Court to dispose of them at the time of the decision (R. p. 276).

No formal rulings were made upon the question of evidence stated in plaintiff's Assignment No. I, nor upon any of the objections to the admission of testimony. Counsel were advised by the trial judge, before the entry of findings, that at the request of either party he would go through the transcript of testimony and announce rulings upon all or any of the objections that had been noted, so that an adequate record might be made for review in this Court. No such request was made and no such action was taken with respect to the question stated in plaintiff's Assignment No. I, nor with respect to any other question of evidence.

Plaintiff's contention that there was a ruling upon the question sought to be reviewed here rests only upon a statement of the trial court in the course of an oral opinion upon the merits. Plaintiff's bill of exceptions explains the statement as follows (R. pp. 290-291):

". . . The court did not rule upon the admissibility of the evidence to which objection was offered as hereinabove noted, nor upon the objections thereto, until the time of rendering his oral opinion, when the court limited the foregoing evidence in connection with the contract to establishing the general course of the projected road to be from the town of Orofino to Headquarters, through the canyon of Orofino creek, and rejected said evidence as representations of the line and grade of said railroad or the amount and character of work to be performed under the contract."

This Court has many times decided that error cannot be predicated upon expressions of a trial judge in an opinion or decision. *Mutual Reserve Fund Life Assn. v. DuBois*, 85 Fed. 586, *United States v. Shingle* et al., 91 Fed. (2d) 85. Accepting literally the explanation of plaintiff's bill of exceptions, it is clear that the District Court did not rule upon or sustain any objection to the admission of the evidence referred to. There was no decision refusing to admit this testimony. The error alleged, if such a decision would have been erroneous, did not occur.

But it must not be assumed that plaintiff's Assignment lacks merely a technical requisite or that it is to be disregarded merely because of the informality of a ruling actually made. The record shows clearly

that the evidence referred to in the Assignment, so far from being excluded, was admitted and fully considered by the trial court. The findings upon the fact issues involved in the change of work claim leave no room for doubt as to this.

The evidence which the Assignment says was rejected was a letter inviting plaintiff to bid on the work, accompanied by maps, profiles, and other data (R. pp. 279-283, 375-377). Finding of Fact VI shows that all of this evidence was admitted. The Finding is a determination of the effect to be given it. It reads as follows (R. pp. 160-161):

> "At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer's estimate of quantities of material to be removed, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad."

Similarly Findings VII and VIII disclose that this evidence was received and fully considered by the trial court. Finding VII compares the line as con-

structed with the location survey, and the bridges and channel changes as constructed with those shown by the preliminary data sent bidders (R. p. 161); and Finding VIII compares the volume of yardage excavated with that estimated by the locating engineer (R. pp. 161-162).

These Findings are consistent with what the trial court said in deciding the case. In discussing the question whether the work contracted for was limited to that indicated by the preliminary data, the Court said (R. p. 331):

> ". . . There is no suggestion in the contract itself nor in the other evidence before the Court that there was any plan upon the part of the Railroad Company or of the Contractor that the line should be confined to the limits of the Chamberlain survey. Insofar as evidence was admissible upon the subject at all the Court finds that there was no misrepresentation upon the part of the Railroad Company as to this proposition. The Contractor knew of the conditions and had almost as much opportunity to investigate the fitting of the line to the country through which it was laid as did the Railroad Company. Chamberlain was not an employe of the Railroad Company at the time that the line was surveyed by him and it was not responsible for his judgment. Proceeding upon this basis the Court finds no theory upon which there could be based an

> award for breach of contract because the defendant misrepresented the situation of the railroad line. According to the contract the plaintiff was to be paid for its labor and material based upon the work done. To this stipulation the plaintiff is bound as part of its agreement."

Thus the oral opinion confirms what is indicated by the findings; the preliminary data sent plaintiff and other bidders was admitted and considered, and after such consideration the Court determined that there was no misrepresentation of the work to be done, since this preliminary data "did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, . . ." (R. p. 161.)

Plaintiff's Assignment and its bill of exceptions attempt to interpret the trial court's opinion as admitting the evidence referred to for one purpose and excluding it for another. The Assignment says that the Court qualifiedly sustained the objections,—that "the offers were rejected as representations of the line or grade . . .", the Court limiting the evidence "to establishing the general course of the projected road" and rejecting it for all other purposes (R. pp. 376-377). The bill of exceptions similarly states that the Court limited the evidence to establishing the gen-

eral course of the projected road and rejected it as representations of the line and grade of said railroad (R. p. 291).

Both the record here (the findings) and the trial court's opinion indicate clearly that the evidence in question was not excluded for any reason but was considered and its meaning and significance determined. The evidence was not rejected if by that is meant its exclusion from consideration by the trier of fact. It was rejected only in the sense that it was not accepted as proving what plaintiff thought it proved.

Plaintiff's grievance is that the Court did not decide in its favor the question of fact to which this evidence was addressed. In effect, its Assignment of Error attempts to challenge what the trial court did in passing upon the testimony. Plaintiff's bill of exceptions indicates that no record was made upon which the decision of the fact issue could be reviewed here, and plaintiff does not profess to be seeking any such review.

In this state of the record, the question raised by defendant's objection to the admission in evidence of the preliminary data sent bidders is not open to consideration here. Since the evidence was

in fact admitted and considered by the District Court, we can find no reason for engaging here in a discussion of its admissibility.

II

COMMERCIAL HAUL CLAIM

1. *The question of pleading presented by plaintiff's Assignment of Error No. II is not reviewable here because the relief sought (a direction to enter judgment for an increased amount) cannot be granted upon the record before this Court.*

Plaintiff's Assignment of Error No. II asserts that the District Court erred in excluding an issue as not pleaded. Plaintiff does not ask that the judgment be reversed or that the case be remanded to the District Court for a trial of this issue. The contention seems to be that if the issue had been considered as among those pleaded, it would have been decided in plaintiff's favor. This is what is implied by the Assignment, which says that the District Court excluded the issue "therefore limiting plaintiff's recovery" (R. p. 377).

Plaintiff's brief, on the other hand, seems to contend that the District Court in fact decided the question, by what was said in certain of the findings (Cross-Appellant's Brief, pp. 23-24); and this

Court is asked to apply the rule of *City of Fort Scott v. Hickman*, 112 U. S. 150 (followed by this Court in *United States v. Stamey*, 48 Fed. (2d) 150), under which an appellate court, upon reversing the judgment of the lower court, may direct the entry of the proper judgment, providing there is in the record a finding upon every controverted issue in the case.

Assuming that plaintiff's cross-appeal is adequate to invoke this revisory power, notwithstanding the fact that reversal of the judgment is not sought (*Empire Fuel Co. v. Lyons*, 257 Fed. 890, 898), and assuming also that the District Court incorrectly excluded an issue properly pleaded, was that issue nevertheless fully decided in plaintiff's favor by the findings made, so that this Court (if it accepts plaintiff's theory of the contract) may direct the entry of a new and different judgment appropriate to such decision?

A statement of the question immediately suggests the answer. The District Court expressly refrained from deciding the issue which was held not to have been pleaded, *because* it was not pleaded. This is what is meant by the statement upon the subject in Finding XVIII (R. pp. 169-170); and it is made

additionally clear by the explanation in the oral opinion (R. p. 339).

The District Court held with plaintiff that the contract between the parties provided not only for the construction of a railroad, but for the conduct of transportation operations thereon, after the track was laid and while the supplemental finishing work was being done. The contract specified September 1, 1927, as the date upon which all work was to be concluded. Plaintiff did not finish the work at this date, but continued until October 25, 1927.

Finding XVI determined that defendant permitted plaintiff to continue the construction work beyond the stipulated time, but that defendant did not permit plaintiff to conduct hauling operations at any time after July 17, 1927, when defendant took over the first 29 miles of the line (R. p. 168). And in Finding XVIII the Court held that "plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; . . . that the right to conduct commercial haul terminated on that date" (R. p. 169). The Finding then concluded with the ruling to which the Assignment here relied on is addressed, as follows (R. pp. 169-170):

> "The Court further finds that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927."

Plaintiff, in assigning only a procedural error, and at the same time seeking to avoid a retrial of the issue, puts itself in a difficult position. To justify its request that this Court direct the entry of a new judgment, it is contended that the District Court in result decided the issue which it professed to exclude,—that the District Court found there was some conduct on the part of defendant which served to extend the time for hauling commercial traffic. This contention is made notwithstanding the specific ruling above referred to that defendant did not extend the commercial haul period, and that plaintiff's right to handle this traffic ended September 1, 1927, which rulings stand unchallenged in this Court.

The contention perhaps misunderstands what was intended by the District Court on the subject of an implied extension. The contract bound plaintiff to complete all work by September 1, 1927, and (according to the Court's interpretation) it gave plaintiff the right to handle the profitable log traffic up to that date. Plaintiff failed to complete the work within the time specified. Defendant did not insist upon its

rights under the contract, but permitted plaintiff to take additional time to complete the construction work. Nothing else appearing, the Court held that the failure to take advantage of plaintiff's breach did not operate as a grant of additional time to plaintiff in which to conduct the profitable log hauling operations. Whether anything done by defendant had contributed to the delay in the construction work, and whether by reason thereof defendant might have been precluded from claiming that the delay in completing the work was a breach of the contract, were questions not considered because not pleaded. The Court said in its oral opinion (R. pp. 339-340):

> "The contract ended by its terms September 1st, 1927, but the road was to have been turned over to the operating department of the Railroad Company by that date. The Contractor breached its obligation to do so. However, the delays and extra expense caused by the Railroad Company might well have been used as a defense for such a claim by the defendant. It, however, does not even raise the point. On the other hand, the plaintiff can not rely upon its own breach or the sufferance of the defendant in permitting it to complete the work by remaining until October 25th as extending to that time the profitable log haul stipulation in the

agreement, where the hauling of the logs had already been taken over by the Railroad Company."

Briefly stated, the question which the Assignment says was pleaded, and which plaintiff's brief says was decided in its favor, is this: Was defendant responsible for the delay in completing the construction work, and did the extension of the time for that work carry with it a like extension of the commercial haul privilege?

An examination of the findings entered will disclose at once that the District Court nowhere determined that defendant was responsible for plaintiff's inability to complete the work within the contract period. There is no intimation in any of the findings that defendant was at fault in this respect. On the contrary, the findings specifically determined that defendant was within its rights under the contract in requiring the additional work, and the changes from the location survey, which plaintiff says caused the delay (R. pp. 160-162). The District Court did not hold, and upon these findings could not hold, that plaintiff had any right to the additional time given it to complete the construction work, or that defendant had in any way surrendered its right to restrict the log hauling privilege (if there was any such

under the contract) to the period fixed by the contract.

Plaintiff's argument seems to assume that the permission given plaintiff to continue construction work beyond the contract period carried with it an extension of the log hauling privilege. It is urged that there was a waiver of the time limit imposed by the contract, and that this waiver impliedly extended the period within which the contractor could handle the commercial log traffic.

This argument ignores the fact that the only thing defendant waived was its right to have the construction work finished by September 1, 1927. Findings XVI and XVII are to the effect that defendant acquiesced in the continuance of track work on a part of the line after the contract date, but did not agree to any extension of the commercial haul privilege; and the Court held (in Finding XVIII) that the right to conduct commercial haul terminated on September 1, 1927 (R. pp. 168-169). These Findings are not challenged here.

It is therefore settled that there was no voluntary extension by defendant of the term for handling commercial traffic. The question we are concerned with here, and which plaintiff's Assignment says was pleaded, was whether defendant had done anything to

bring about an involuntary extension, despite its intention to the contrary. Whether pleaded or not, this question certainly was not passed upon or decided in plaintiff's favor by the District Court, and there is no record here upon which a new or different judgment could be entered.

2. *Plaintiff's pleadings do not present the question whether conduct on the part of defendant entitled plaintiff to additional time, not only to complete the construction, but also to handle log traffic, under the commercial haul clause of the contract.*

The question for consideration here is whether or not the District Court erred in making the following ruling, as a part of Finding of Fact XVIII (R. pp. 169-170):

> "The Court further finds that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927."

We restate briefly the facts necessary to an understanding of this question:

The contract between the parties obligated plaintiff to complete the construction of the railroad by September 1, 1927 (R. p. 52). On July 17, 1927, after track had been laid on the first 29 miles of the line, and before completion of all work that might have

been required, defendant stopped work on this part of the line and took possession thereof, in order to begin log transportation thereon. Plaintiff was directed to proceed with the completion of the work on the remainder of the line (R. pp. 165-166). Thereafter and on October 7, 1927, a similar direction was given to stop work upon another portion of the line, but to proceed with the completion of the remainder (R. pp. 166-167). All work by plaintiff was discontinued on October 25, 1927, but defendant's Engineering Department continued track finishing work until December 31, 1927, when the line was turned over to defendant's Operating Department (R. pp. 166-168).

Plaintiff's complaint alleged that defendant's action in taking over a part of the line on July 17, 1927, was a breach of contract and that the log traffic accepted and moved by defendant after that date would have been handled by plaintiff as commercial haul, if the contract had not been so breached (R. pp. 19-21). The complaint alleged that this right to handle log traffic continued not only to October 25, 1927, when all construction work by plaintiff ceased, but to December 31, 1927, when the line was turned over to defendant's Operating Department (R. pp. 20-21).

The District Court held that the contract gave plaintiff the right to handle this log traffic as com-

mercial business under the contract up to the date specified in the contract for completing the construction work, September 1, 1927, but found that there had been no extension of that right beyond the contract date (R. pp. 168-169). This ruling is not challenged here, but it is contended that the Court should have considered whether conduct on the part of defendant entitled plaintiff to continue handling the log traffic up to the time all construction work by plaintiff ceased, October 25, 1927. The original contention that the alleged right continued to December 31, 1927, seems to have been abandoned. (Cross-Appellant's Opening Brief, pp. 23-24.)

While plaintiff undoubtedly alleged in its complaint that its supposed right to conduct log transportation operations continued beyond the contract date, September 1, 1927, it is quite clear that the pleader had no thought in mind of an involuntary extension forced upon defendant by some act or omission on its part. The theory of the complaint is that because of changes in the work (made pursuant to a right reserved in the contract), the parties by agreement changed the contract date for all purposes (R. p. 20).

This theory was not accepted by the District Court. Its finding was that defendant merely excused plaintiff's default in not completing the construction work

in time; and the Court held that this could not have been intended as an extension of the commercial haul privilege, since defendant had theretofore declared that beginning July 17, 1927, plaintiff would not be permitted to do any work or conduct any operation upon the part of the line taken over (R. pp. 168-169, 339-340).

The Court's oral opinion noted that defendant had not made any point of plaintiff's failure to complete the work in time, and suggested that if the point had been raised, delays and extra expense caused by defendant might have been relied upon by plaintiff as an excuse (R. p. 339). Presumably as a result of this suggestion, there was included in the findings the statement that "plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927." (R. pp. 169-170).

Plaintiff's theory, as stated in its complaint, cannot be altered to fit this suggestion of the trial court. Instead of pleading that actions or conduct of defendant made performance within the time limit impossible, and that by reason thereof plaintiff became entitled to an extension of the contract for all purposes, the complaint alleged that defendant "per-

mitted plaintiff without objection to extend the time of completion," because defendant theretofore had made changes in the work (under an appropriate provision of the contract) which resulted in extra costs and delay (R. p. 20).

It should be kept in mind that the paragraphs of the complaint on this subject refer primarily to the claim that plaintiff was entitled to recover additional compensation for the construction work because of changes in the work contracted for, under the provisions of the contract permitting changes and authorizing additional allowances therefor in the judgment of the Chief Engineer. It was the increased cost of doing the work and not the extra time required that was emphasized. Indeed, it was alleged that because of the requirement for completing the work "approximately on the schedule provided in said contract," the excavation could not be delayed for good weather but went ahead in winter under adverse weather conditions (R. pp. 9-10).

The same claim is made in paragraphs IX and XI of the complaint with references to other phases of the work. The changes required were said to have delayed the contractor's program, with the result that much difficult work had to be done in the win-

ter season in order to avoid substantial delay in completing the construction of the railroad (R. pp. 13, 15-16). These were not allegations excusing delay and claiming the right to additional time for completing the work; they were claims of increased construction costs because of the necessity of doing the increased work without any substantial delay beyond the time limit imposed by the contract.

When the complaint comes to the claim for breach of contract in depriving plaintiff of the supposed right to handle the log traffic, all that is said on the subject of an extension is that "because of the matters and things hereinbefore alleged, defendant permitted plaintiff without objection to extend the time of completion" (R. p. 20). This seems to assume that an extension of time for completing the construction work would automatically extend the period for handling commercial business. This might be the case if what was meant was the hauling of commercial cars in work trains while the contractor was engaged in actual construction work.

But plaintiff's commercial haul claim proceeds upon a very different theory. The contract is read as granting plaintiff the right to handle all commercial traffic during a fixed period, entirely independ-

ent of the construction work and the work train service operated in connection therewith. This was a valuable right, and not a mere incident of the construction job, according to the complaint; so much so that (as it is claimed) plaintiff counted heavily on the profit to be made therefrom in making its bid for the work (R. p. 19).

It is a necessary limitation of this theory that any such valuable right would not be enlarged or continued in effect by implication, or because defendant excused plaintiff's breach in failing to complete the construction work on time. As pointed out by the trial court (R. pp. 339-340), plaintiff "can not rely upon its own breach or the sufferance of the defendant," as bringing about an extension of rights or privileges claimed under other provisions of the contract.

The complaint pleaded merely that defendant did not object to the additional time taken in completing the construction work. The trial court suggested that plaintiff might have pleaded delays and extra expense attributable to defendant as entitling plaintiff to the additional time, and perhaps also to an extension of all its rights and privileges under the con-

tract. No such contention appears in the complaint, and the finding that there was no such issue pleaded (R. pp. 169-170) is not open to attack.

III

COMMERCIAL HAUL CLAIM— ALLOWANCE OF INTEREST

Interest is recoverable in breach of contract actions, not as interest, but as part of the damages. The equivalent of interest may thus be included in a verdict or finding in certain cases, but its inclusion or exclusion is dependent upon the discretion of the trier of fact in determining the amount of damages required to compensate the injured party.

Plaintiff's Assignment of Error III does not indicate what specific ruling of law made by the District Court is challenged. The Assignment says merely that the Court erred "in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul during construction" (R. p. 383). Exceptions had been taken, both to the finding which fixed the damages without interest, and to the conclusion of law specifying the amount of recovery on this item, without interest (R. pp. 322-323).

No ruling had been requested during the trial that plaintiff was entitled to interest upon whatever award might be made upon this breach of contract

claim. Plaintiff's requested conclusion of law upon the subject of interest merely asked for a ruling that plaintiff was entitled to recover interest on all sums which should have been certified as due in a final estimate on February 1, 1928 (R. p. 325).

We understand plaintiff's argument to be that the damage award of $125,000 must be considered the same as a payment due under the contract, and that since all contract payments should have been made not later than February 1, 1928, the District Court was required, as a matter of law, to include interest upon the award from this date to the entry of judgment.

The premise of this argument is entirely unsound. Plaintiff did not haul log cars for defendant between July 17, 1927, and September 1, 1927, and nothing whatsoever was due plaintiff for any such service under the contract on February 1, 1928, or at any other time. Defendant refused to allow plaintiff to perform the service. If that refusal was a breach of contract, plaintiff became entitled to recover as damages such sum as a court or jury might fix as necessary to compensate it for its loss.

The District Court's finding was such a damage award, and was not in any sense a determination that the sum specified was a payment due under the terms

of the contract. Having held that plaintiff had been wrongfully deprived of the opportunity to handle commercial traffic at $1 per car mile, the Court undertook to ascertain the extent of the loss sustained. There was a conflict of evidence as to how much hauling would have been done and also as to what the operation would have cost plaintiff. The Court adopted plaintiff's view that but for the alleged breach, plaintiff would have handled as commercial haul under the contract all of the log traffic which defendant in fact accepted and transported. The precise number of cars moved (prior to September 1, 1927,) was not shown. The Court's finding as to this is based upon testimony showing the amount of tonnage handled by defendant from the beginning of its operations to October 25, 1927, and up to December 31, 1927. Upon the question of plaintiff's probable operating costs, there was evidence from which the Court reached a conclusion as to what would have been expended in these longer periods; and without attempting to compute the net result with mathematical accuracy, the Court found that plaintiff "was damaged in the sum of $125,000 by being deprived thereof (of the commercial haul) up to September 1, 1927." (R. p. 169.)

An explanation of this appears in the oral opinion of the District Court as follows (R. p. 340):

> "But, although figures were presented in detail for other periods, there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st. The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at $125,000."

It is apparent, therefore, that neither the amount sued for, nor the amount awarded as damages, can be considered as moneys due plaintiff at the conclusion of the construction job. What plaintiff lost, according to its contention, was an opportunity to make a profit in operating log trains. Neither of the factors required for the determination of this profit (the gross receipts and the operating costs) was an ascertained or a definite figure. The District Court, even upon plaintiff's theory (that the tonnage actually moved by defendant in its own operation indicated what it would have called upon plaintiff to move as "commercial haul"), found it necessary to estimate the amount of traffic for the particular period; and to reach a conclusion as to the deductible operating costs, it was necessary first to choose between the conflicting cost estimates of the parties

for the longer periods, and then to adapt the one chosen to the shorter period. The result was an approximation, equivalent perhaps to a jury verdict.

It is not open to question that unless required by state law, under the Rules of Decision Act (28 U. S. Code Ann. Sec. 725), a damage award thus made by a jury, or by a court sitting without a jury, is not to be increased by adding interest prior to judgment. A jury may be permitted, in a breach of contract action, to include the equivalent of interest as part of the damages awarded, when necessary, in the judgment of the jury, to make the award fairly compensatory. But this is discretionary with the trier of fact and cannot be compelled as a matter of law. *Miller v. Robertson*, 266 U. S. 243, 258; *Concordia Insurance Co. of Milwaukee v. School District No. 98*, 282 U. S. 545; *Barrett v. Panther Rubber Mfg. Co.*, 24 Fed. (2d) 329, 337; *Gasoline Products Co., Inc., v. Champlin Refining Co.*, 39 Fed. (2d) 521.

These and many other decisions of Federal Courts settle that where the question is unaffected by state law, and the demand is for damages the amount of which is to be determined at the trial, interest upon

the award made cannot be claimed as a matter of right. Plaintiff apparently recognizes this. Its brief attempts to characterize the claim as a liquidated demand, due under the contract for services performed, notwithstanding the fact that there were no such services. What plaintiff sought in its complaint, and what the Court awarded were not payments due under the contract, but damages for the alleged breach; and the amount of these damages could not be determined until the Court had weighed the evidence and ascertained the extent of the loss attributable to the alleged breach.

But the question of allowance of interest is not unaffected by the law of the state. Federal jurisdiction was invoked because of diversity of citizenship, and the substantive law of the case is not controlled by any Federal statute or rule. *(Compare Chicago, M., St. P. & P. R. Co. v. Busby,* 41 Fed. (2d) 617.) In these circumstances, the question of interest on a damage award is generally held to be governed by state law. *George M. Jones Co. v. Canadian Nat. Ry. Co.* et al., 14 Fed. (2d) 852; *Jones v. Foster,* 70 Fed. (2d) 200, 206.

We come then to the question whether the Oregon interest statute as interpreted by the State Su-

preme Court requires the addition of interest prior to judgment upon the District Court's award of damages. We understand plaintiff to so contend; it is not claimed that the Court, as a trier of fact, failed to make a large enough award, but that the Court, after deciding this fact issue, was required by law to include in the judgment interest from the date when payments under the contract became due.

The present Oregon statute (Oregon Code Ann. Sec. 57-1201) provides that interest shall be payable "on all moneys after the same becomes due." Prior to the amendment adopted in 1917 (General Laws of Oregon, 1917, Ch. 358), this provision in the statute was limited to certain specifically enumerated types of obligation. *Sargent v. American Bank and Trust Co.*, 80 Or. 16, 38, 154 Pac. 759, 156 Pac. 431. The amendment removed this limitation so that interest is now payable on all money obligations after their due date.

But the Supreme Court of Oregon has uniformly held, both before and after the 1917 amendment, that unliquidated damages for breach of contract cannot be classed as moneys due within the meaning of the interest statute. It is recognized that interest may sometimes be allowed as damages *(Lives-*

ley v. Johnston, 48 Or. 40, 53, 84 Pac. 1044, 1049), but the addition of interest after the damages have been ascertained and fixed has never been allowed.

In *Williams v. Pacific Surety Co.*, 77 Or. 210, 146 Pac. 147, 149 Pac. 524, an action for damages for breach of a contract to furnish logs to a sawmill, the court (at page 221) said:

> "There is no controversy about the nature of this action. It is for unliquidated damages, and the rule is well settled in this state that interest cannot be recovered thereon: *Hawley v Dawson*, 16 Or. 348 (18 Pac. 592); *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726); *Smith v. Turner*, 33 Or. 381 (54 Pac. 166). The court erred in giving judgment for interest."

In *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172, 183 Pac. 476, an action for breach of contract to deliver merchandise, the damages were in fact ascertainable in advance. The amount awarded represented the difference between the contract price and the market price at the time and place of delivery. The jury was permitted to add interest. In modifying the judgment to exclude the interest, the court said (p. 400):

> "It is also contended that the court erred in permitting the plaintiff, during the trial, to amend its complaint by adding thereto a demand for

> interest, and submitting to the jury the question of interest. This question is settled beyond further discussion in this state, in favor of defendant's position."

See also *Propst v. William Hanley Co.*, 94 Or. 397, 185 Pac. 766, in which the allowance of interest upon an award of damages for breach of contract was held to be error. The court said (p. 404):

> "The cases of *Williams v. Pacific Surety Co.*, 77 Or. 210 (146 Pac. 147, 149 Pac. 524), and *Sargent v. American Bank and Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431), settled the matter of interest adversely to the plaintiff, so that the court was in error in directing the jury to allow interest on the amount from the time of the breach up to the day of trial."

Both of the cases last cited were decided after the 1917 amendment to the interest statute. A more recent case declaring the same rule is *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 259 Pac. 1064, 260 Pac. 1099, 262 Pac. 261. In this case the court said (123 Or. 480):

> "It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was

> damaged in the sum of $1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease."

So far as we have been able to find, the Supreme Court of Oregon has never sanctioned the addition of interest to an award of damages for breach of contract. The amendment in 1917 does not touch the question because of the uniform holding that damages in breach of contract actions cannot be considered as moneys due within the meaning of the interest statute. All of the Oregon cases cited by plaintiff as indicating that a different rule was established by the amendment of the statute involve claims for moneys due on contract. This is true also of *New York Alaska Gold Dredging Co. v. Walbridge*, 38 Fed. (2d) 199, decided by this Court in 1930. Plaintiff's brief says of the case, "The issue was about the same as in the case at bar." (Cross-Appellant's Opening Brief, p. 29.) The claim in the *Walbridge* case was for money loaned and for salary due under the terms of an employment contract.

We submit, therefore, that the Oregon rule, so far from requiring the addition of interest to the damage award made, forbids any such allowance. The decisions of the Oregon Supreme Court, thus in-

terpreting the interest statute upon which plaintiff necessarily relies, are controlling here. But if for any reason the question is not foreclosed by the Oregon decisions, the result is the same. The allowance of interest, or its equivalent, was within the discretion of the trial court; its decision refusing to add interest to the damages awarded is not open to attack upon plaintiff's cross-appeal.

Occasional statements in plaintiff's brief give the impression that plaintiff may be asking this Court to exercise a discretionary judgment upon the question of adding interest in order to make the damage award fully compensatory. We shall not undertake to argue the merits of this question. If we are wrong in our assumption that the discretionary power to allow or withhold interest belonged to the District Court as a trier of fact, and if, upon any theory, its exercise of discretion is reviewable here, we need only add that the District Court had the entire record before it, and was in much the better position to determine whether substantial justice required the allowance of interest. It may well be inferred that the decision against the allowance of interest was influenced to some extent by facts known to the trial judge, explaining the long delay to which the litigation has

been subjected. Some hint of this is given by what was said in the oral opinion; the Court noted that the case was once set for dismissal under the rule requiring some action to be taken in a cause within a year (R. p. 330).

IV

BRIDGE MATERIAL CLAIM—ALLOWANCE OF INTEREST

Plaintiff having sued for damages for breach of contract and not for moneys due and payable under the contract, interest could only be allowed as part of the damages. The damages having been ascertained and fixed by the trial court, without interest, the applicable state rule forbids increasing the damages by adding interest.

Plaintiff's Assignment of Error IV complains of the refusal of the District Court to add to its award of damages for alleged breach of the provisions of the contract applicable to the haul of bridge materials, interest from the time when payments under the contract became due and payable.

We pointed out in discussing plaintiff's Assignment of Error III that in an action such as this, where no federal right is asserted, the Rules of Decision Act (28 U. S. Code Ann. Sec. 725) requires

adherence to the law of the state, and that the Oregon interest statute has uniformly been interpreted as not requiring, or indeed permitting, the allowance of interest upon an award of damages for breach of contract.

The question here involved differs from that presented by Assignment III only in that here plaintiff had a choice of remedies. Suit could have been brought on the contract to recover the amounts payable at the "hauling" rate claimed to be applicable, less what had already been paid by defendant. Instead, plaintiff chose to sue for damages for the alleged breach, including the claim with several others which combined to make up a demand for damages in the total sum of $691,874.66 (R. p. 24).

The District Court took the position that under the Oregon rule the form of action chosen controlled the question of interest. The Court said (R. pp. 341-342):

> "The Court, as it stated at the outset, considers this an action on the contract for damages and for breach thereof. It is not an action for amounts due under a written contract. If this were true a great many of the questions involved in the complaint could not have been tried or considered. The Court therefore feels

> that under the Oregon statute it is not bound to allow interest from the date of final estimate but rather is required to allow interest only from the date of entry of the judgment in damages."

Plaintiff apparently does not challenge the correctness of the Court's characterization of its complaint. The opening statement of the brief avoids making any commitment as to the nature of the cause or causes of action asserted. (Cross-Appellant's Opening Brief, pp. 2-6.) In the discussion of the interest question the claims are referred to as demands for money due under the contract, but the point made seems to be that interest should be allowed despite the fact that the action is one for breach of contract. (Cross-Appellant's Opening Brief, pp. 26-27, 33, 35-41.)

Whatever may be the rule elsewhere, it is clear that in Oregon interest is not collectible upon damage awards in any kind of breach of contract action. The distinction plaintiff seeks to draw between liquidated damages, or damages susceptible of ascertainment by some definite standard, and damages not so liquidated or ascertainable, has never been recognized by the Supreme Court of Oregon. On the contrary, the cases since 1917 (when the interest statute

was broadened), indicate clearly that in any breach of contract action the damages sought, whether easily ascertainable or not, cannot be considered as moneys due under the provisions of the interest statute. The jury may in some instances be permitted to include the equivalent of interest as part of the damages sustained, but the damage award itself is not in the category of moneys which became due or upon which interest can be allowed under the statute.

In *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172, 183 Pac. 476, the damages sought were, if not liquidated, readily ascertainable. Defendant had refused to deliver a quantity of lumber and the damages claimed represented the difference between the contract price and the market price at the time when delivery should have been made. In reversing an allowance of interest upon the damage award, the court said that the question had been settled "beyond further discussion in this state." (93 Or. 400.)

Similarly in *Propst v. William Hanley Co.*, 94 Or. 397, 185 Pac. 766, the damages sought for breach of contract represented the difference between the contract price and the market value of the commodity which should have been delivered. A direc-

tion to the jury to allow interest on the amount from the time of the breach up to the time of trial was held erroneous.

In *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 259 Pac. 1064, 260 Pac. 1099, 262 Pac. 261, the Supreme Court of Oregon again held that a damage award could not be increased by adding interest even though the jury might have been permitted to consider the equivalent of interest in arriving at the amount of the verdict. The action was one for breach of a lease. The jury apparently awarded the plaintiff the net amount of advance rentals paid, and the trial court then undertook to add interest from the date of the lease. The Supreme Court applied the rule of the earlier cases, holding that since the action was one to recover damages for breach of a contract, the trial court had no power to increase the jury's allowance by adding interest. The court said (123 Or. 480):

> "It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was damaged in the sum of

> $1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease."

It has always been the rule in Oregon that after the breach of a contract, interest is not recoverable except as damages. *Seton v. Hoyt,* 34 Or. 266, 55 Pac. 967. The cases just cited demonstrate that this rule has not been changed by the amendment to the interest statute in 1917. If the jury, or the court sitting without a jury, fixes the damages without including anything as the equivalent of interest, the verdict or finding is conclusive, and the amount allowed cannot be increased by adding interest prior to judgment.

We submit that the question of interest, or its equivalent as an element of damages, upon the award made, was one for the District Court sitting as a trier of fact. If there was a breach of the contract with respect to the payment for hauling bridge materials, which we deny, the District Court's decision as to the amount of damages sustained cannot be increased here by adding interest prior to judgment.

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No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

ANSWERING BRIEF OF TWOHY BROTHERS TO APPELLANT'S OPENING BRIEF

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

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No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

ANSWERING BRIEF OF APPELLEE

In litigation to recover on a railroad construction contract appellant, Northern Pacific Railway Company (defendant in the trial court), suffered a judgment based on three counts in the complaint:

(1) For the stipulated price for conducting a commercial haul of which defendant wrongfully deprived plaintiff;

(2) For a balance due plaintiff for hauling bridge construction materials for which defendant had refused to pay the prices stipulated in the contract;

(3) For a balance due on book accounting.

The judgment on book accounting was entered pursuant to stipulation. The appellant is challenging the judgment on the commercial haul and the judgment on the bridge material haul. The commercial haul here involved consisted of saw logs which the Clearwater Timber Company had cut and banked along the right of way to be

moved as soon as rail was laid on the lower end of the railroad under construction. This item was frequently referred to as "log haul" at the trial. The item for hauling to the several bridge sites of materials to be used in erecting bridges was frequently referred to as "material haul".

To keep the record clear, we challenge the accuracy of the assumption in appellant's opening statement (B. p. 5) that appellee does not question the contention that plaintiff's right to additional compensation for construction work depends upon allowance by the chief engineer. The complaint is sufficient to permit recovery on two theories: (1) misconduct of the chief engineer, and (2) breach of contract by departing from representations on which bids were submitted. The complaint was not challenged. Ruling out as representations the information upon which bids were submitted effectually prevented recovery for breach of contract. We have tested the correctness of that ruling by plaintiff's first assignment of error on cross-appeal (Cross-appellant's opening brief, p. 8). The assumption of appellant (and the trial court) is that the only remedy, in absence of a decision by the chief engineer, is by abandonment of the contract. There are many such cases where the entire claim can be thus presented. We think it is not the only method of relief. Materially changing the work represented is a breach of contract.

Faber v. City of New York (1918) 222 N. Y. 255; 118 N. E. 609, 610;
National Contracting Co. v. Hudson River Water Power Co. (1908) 192 N. Y. 209; 84 N. E. 965, 967.

In the instant case defendant's theory would compel plaintiff to abandon either the construction claim or the commercial and material haul claims—the same complaint could hardly abandon the contract and claim on contract. The law, however, affords a remedy for every wrong. If departure from representations is a breach, suable as such, remedy for each wrong is available.

Plaintiff challenges the statement on appellants brief (p. 7) that there was a "newly built line" of railroad. This assumption appears throughout appellant's brief in discussing the log haul. There was in fact no newly built line. Grade had been thrown up and rails laid, but no portion of the line was completed or ready for traffic, other than such as could be conducted during construction (Finding XV, R. 168); the entire lower line was in use by the contractor transporting construction materials (R. 224, 226). The entire line was under construction, and in possession of plaintiff under contract to construct it.

DEFENDANT'S RECORD INSUFFICIENT TO GO BACK OF COURT'S FINDINGS

Defendant-appellant has presented twenty-six assignments of error. They constitute multiple efforts to assign a limited number of assertions of error. As noted later, we think defendant failed to preserve a record sufficient to present any of the asserted errors.

Assignments I to XIV, inclusive, (R. 346-360) deal with the commercial (log) haul, contending the trial court erred in refusing requests to make evidentiary findings and erred in findings and conclusions made.

Assignments XV to XXV, inclusive, (R. 360-367) challenge the refusal to make requested evidentiary findings and assert error in the findings and conclusions made with respect of the material haul.

Assignment XXVI (R. 367) refers to a finding not mentioned in the bill of exceptions and will not be further mentioned here.

Defendant admits on brief that the findings involve the construction of a contract and the intention and interpretation thereof by the parties (Brief, pp. 33-39). In addition to the argument of appellant, we suggest:

(a) As to the log (commercial) haul the court had before it evidence

(1) That the probability of such haul was indicated by defendant when inviting bids (R. 218, 225);

(2) That plaintiff reduced its hard rock bid on this information, expecting to make it up on the commercial haul (R. 218);

(3) That defendant asked plaintiff's permission to take the log haul long before it could naturally come up (R. 211);

(4) That defendant's chief engineer endeavored to coerce plaintiff's consent to give up the log haul (R. 195, 234);

(5) That plaintiff did not consent to give up the log haul and thereafter defendant referred to the money plaintiff would make on the log haul (R. 200, 215-216);

(6) That plaintiff prepared to conduct the log haul (R. 201, 224);

(7) That defendant hauled some right of way logs and on complaint of plaintiff defendant desisted and furnished an accounting (R. 217, 227) and thereafter plaintiff did the hauling (R. 249);

(8) That until the "Stop Work" order (the defendant took from plaintiff an uncompleted part of the road to get the log traffic) plaintiff hauled the logs (R. 201) and was paid at the commercial haul rate (R. 209);

(9) That defendant made a final effort to get the log haul (R. 200) and finally stopped work on a part of the uncompleted railroad to get the log haul (R. 205);

(10) The court also had to determine whether the log haul was commercial business.

(b) With respect of the use of the "Stop Work" clause of the contract, the court had before it not only the language of the contract but also evidence of the bad faith of defendant and its misuse of the clause.

(c) With respect of the price for hauling bridge supplies (material haul) the court's findings again involved facts. There was evidence indicating

(1) That when the bids were under consideration, defendant, with consent of plaintiff, eliminated all reference to "team haul" in the stipulated prices for this work and substituted therefor "hauling" so the contract prices would cover hauling by every means (R. 261);

(2) That although now claiming that bridge timber hauled by rail should take only the commercial haul rate, the chief engineer of defendant when computing the several bids included nothing under the commercial haul item for hauling bridge materials although he knew there would be a substantial amount (R. 268).

(d) With respect of the claimed arbitration of the price for the material haul, the court had before it not only the right to include this question of law in any submission to the engineer, but also whether there was in fact a submission and the bad faith of the engineer. There was evidence indicating (1) that the engineer himself raised the material haul price before there was any controversy and announced a decision arbitrarily and without hearing or opportunity for hearing (R. 234); (2) coupling his announcement with intimidation through threat of his power as chief engineer in charge of construction for defendant (R. 195).

We suggest that defendant-appellant's record presents to this court only the question of whether the findings made by the court support the judgment entered; that this court must accept the trial court's findings as the facts.

(1) The case involves four claims or causes of action in one statement. Defendant did not move the court for a general or special finding in its favor on the whole or any part of the case on the ground that there was no substantial evidence to sustain any other conclusion. In the absence of such motion the appellate court accepts the

facts found by the trial court and looks merely to see if they support the judgment.

O'Brien, Manual Federal Procedure, 1937 Supp. P. 10-11.

Dangberg v. Day (1918), 247 Fed. 477, 478 (9th CCA).

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640 (9th CCA).

Gillespie v. Hongkong & Shanghai Banking Corp. (1927), 23 F. (2d) 670, 671 (9th CCA).

Pabst Brewing Co. v. E. Clemens Horst Co. (1920), 264 Fed. 909, 911 (9th CCA).

Denver Live Stock Commission Co. v. Lee (1927), 20 F. (2d) 531, 532 (8th CCA).

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

White v. U. S. (1931), 48 F. (2d) 178, 181 (10th CCA).

Pabst Brewing Co. v. E. Clemens Horst Co. (1920), 264 Fed. 909, 911 (9th CCA).
(Middle p. 911)

"In *Dangberg Land & Live Stock Co. v. Day,* 247 Fed. 477, 159 CCA 531, where a jury trial was waived and special findings of fact were made in favor of the defendants, and where at the close of the testimony plaintiff in error made no request for a finding in its favor on the issues, and made no motion or request presenting to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant, this court held that the sufficiency of the evidence to support the findings was not open to review in the Court of Appeals. Such is the general rule of decision."

Denver Live Stock Commission Co. v. Lee (1927), 20 F. (2d) 531, 532 (8th CCA).

Reaffirming the rule clearly stated in the earlier case of *Allen v. Cartan & Jeffrey Co.* (1925), 7 F. (2d) 21 (a

case which the Ninth Circuit Court of Appeals cited with approval in *Macomber v. Goldthwaite*, supra), the court quoted the following from the Allen case with the italics as here used:

(Middle first column, p. 532

"The question of the sufficiency of the evidence to sustain the finding and judgment 'is reviewable only when a request has been made to the trial court, before the close of the trial, that it adjudge, *on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party*'."

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Referring to a trial court's findings where a jury is waived, the court said:

(Top page 63)

"It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party."

(2) No error can be successfully assigned for refusal of the trial court to make special findings. It is discretionary in the court to make special or general findings, and if it elects to make special findings but does not adopt those requested, that also is immaterial. Only by a motion for a finding on the whole or some phase of the case on the stated ground that the evidence will sustain no other conclusion can appellant preserve any other question than those which appear on the primary record.

Henry H. Cross Co. v. Texhoma Oil & Refining Co. (1929), 32 F. (2d) 442, 445 (8th CCA).
Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (1932), 62 F. (2d) 530, 536 (9th CCA).
Lahman v. Burnes Nat. Bank (1927), 20 F. (2d) 897, 898 (8th CCA).

(3) Requests for evidentiary findings or findings with respect of probative facts present no question on appeal. Ultimate facts only should be found.

Tricou v. Helvering (1933), 68 F. (2d) 280, 283 (9th CCA).
Becker v. Evens & Howard Sewer Pipe Co. (1934), 70 F. (2d) 596, 598 (8th CCA).
Anglo-American Land etc. Co. v. Lombard (1904), 132 Fed. 721, 734 (8th CCA).

(4) Defendant-appellant failed to advise the trial court of any ground or reason for any exception reserved, whether to the refusal to make requested findings, or to the findings made by the court. An exception to a finding made by the court, like an exception to instruction given to a jury, must state the reason therefor so the trial court may correct the error if the exception is deemed meritorious.

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640 (9th CCA).
Webb v. National Bank of Republic (1906), 146 Fed. 717, 718 (8th CCA).
Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640, (9th CCA).

(First column, page 640)

"But, of the matters included in the assignments, few are before us for review, for it is thoroughly well established that, where a jury is waived and trial is had to the

court and special findings are made, in the absence of a request for special findings of fact and of exceptions reserved, based on the ground that special findings *made by the court* have no evidence to support them, and of exceptions to the conclusions of law drawn by the court from the facts found, the appellate court cannot review the decision of the trial court upon the merits." (Italics ours.)

Webb v. National Bank of Republic (1906), 146 Fed. 717, 718 (8th CCA).

(Middle page 718)

"The purpose and office of an exception is to sharply call the attention of the trial court and of opposing counsel at the time to the specific ruling or finding challenged to the end that the court may at once correct it, if it is erroneous. An exception which does not give this notice of the specific error claimed utterly fails to perform its function and is futile. * * * The court and opposing counsel would have been aware that the plaintiffs were of the opinion that the finding and the judgment against them were erroneous if no exception whatever had been taken, and the exception here under discussion gave them no more information."

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Of the necessity of stating reasons for exceptions to the court's findings the cited case said:

(Bottom page 63)

"There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that

there may be a clear record of the rulings and the challenges thereof. For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling."

We direct attention to the findings requested by defendant, to those made by the court and the exception thereto. The findings requested by defendant and refused by the court respecting the log haul are three in number, XV (R. 179), XVI (R. 180) and XVII (R. 181). Each is evidentiary and not of the ultimate fact. These are the only requested findings involved in assignments of error I to XIV, inclusive.

To the special findings made by the court and challenged in these assignments no sufficient exception was reserved. The findings thus challenged are XV (R. 164) and XVIII (R. 169). Finding XV is mentioned in assignments I (R. 347), II (R. 347), V (R. 349) and VI (R. 349). Finding XVIII is mentioned in assignments IV (R. 348) and V (R. 349). Exception to finding XV is at page 189 of the record. It states no reason for the exception. We find in defendant's bill of exceptions no exception to finding XVIII.

A reference to the findings requested and refused respecting the material haul discloses that there are two requests, XVIII (R. 251) and XIX (R. 252). Both are evidentiary. The exceptions are insufficient. (R. 252, 253.)

The special findings of the court respecting this haul that are made the basis of assignments are finding XIX (R. 170) and XX (R. 171). Finding XIX is mentioned in assignments XV (R. 360) and XVIII (R. 362). Finding XX is mentioned in assignments XVI (R. 361), XVII (R. 361 and XIX (R. 363).

The exception to finding XIX is at page 256 of the record, that to finding XX at page 257. The parts of these findings excepted to are designated but the court is not given any further information or reason for the exception.

Where questions of fact are involved proper findings must be requested and proper exceptions reserved to the findings made by the court to present any question other than the propriety of the conclusions from the findings made.

Clearly the findings do support the judgment. Defendant-appellant challenges the judgment in two respects: (1) Awarding a recovery on the commercial haul; and (2) Awarding a recovery on the material haul.

In finding XV (R. 164), at page 168, the court finds the log haul was commercial business, that plaintiff was entitled to conduct it, that plaintiff had been conducting it (R. 165) until defendant took portions of the road under a misuse of the "Stop Work" clause of the contract (R. 166) at a time when the portion taken was not completed, and defendant itself finished the work; that defendant was progressing satisfactorily with its contract (R. 168) and the taking was in bad faith to acquire the log haul and deprive plaintiff thereof.

Finding XIX (R. 170) fully covers the material haul and Finding XX (R. 171) forecloses a claim of umpire decision. The court finds adversely to estoppel or waiver.

Without an adequate exception to the facts found by the court, the only question is whether they support the conclusions drawn therefrom and resulting judgment. Reserving our objections to the adequacy of defendant's record to present the questions argued in its brief, we discuss those questions.

THE COMMERCIAL HAUL

Defendant divides its argument re commercial haul into three parts, (1) that the contract does not obligate plain-

tiff to conduct that haul during construction, (2) that, if it does, defendant could defeat the right by taking over an uncompleted part of the road under construction, and (3) if it does, defendant could defeat the right by simply taking over the haul itself under a claim of change of work.

I.

Defendant encountered some difficulty in presenting its argument as to the meaning of the contract covering the commercial haul, and its meaning covering the material haul. As to the commercial haul, defendant contends for an interpretation by the "contract proper" (first portion) as distinguished from the entire contract (appellant's brief, p. 28), but when discussion of the material haul is reached, consideration of the entire contract is urged (Brief, p. 58). The latter position is correct. For convenience, the contract was subdivided, but it is entire, each division being a part of the whole by express provision. The first statement, after the introductory clause, refers to "the specifications hereto annexed and *made a part of this contract.*" (R. 52.)

If the contract specifically requires that the contractor conduct the commercial haul while the road is under construction, we think there will be no question of the *right* of the contractor to perform. We think the language of the contract in this respect is clear:

> "Contractor shall handle with his own work train, prior to date line is turned over to operating department of the company, all commercial business, material and empty cars of the company used in commercial service and in the service of other contractors." (R. 123.)

That is, the contractor as a part of its construction contract is to (1) conduct all commercial business, (2) handle material and empty cars of the company used in commercial service, and (3) handle such cars used in the service of

other contractors. The trial court thought the contract clearly included the duty and right to conduct this haul. (R. 335-336.) If there is room for construction, based upon other provisions of the contract, and the conduct of the parties, we submit the same conclusion must result.

We think this is not the usual railroad construction contract, but in some respects very unusual. Bidders were advised that logs would be ready to haul early in 1927, and that the road would be expected to haul logs while under construction—after June 1, 1927. (R. 225.) The terms of the contract must be considered in the light of this information. Clearly it was the intention that the contractor alone could operate over the railroad while under construction and until turned over to the operating department of defendant.

Certainly the defendant could reserve the right to operate over the line, if it could find a contractor who would undertake the work subject to the inconveniences that would be caused by trains under control of another. Just as certainly, if this was intended, a simple clause reserving this right and subjecting the contractor to these burdens should and would have been in the contract. No such right is reserved. The only right reserved in defendant respecting train operation is for ballast trains under specified restrictions. (R. 122.) Such specific reservation cogently denies greater rights in defendant.

The contract throughout manifests intention to place the road in control of the contractor during construction, with all obligations flowing therefrom.

The contractor must keep open and safe all private road crossings (R. 53) and can not employ any men who have been discharged from other work of defendant for named reasons (R. 55); the contractor must haul all materials to be used in the construction work (R. 59-60); the haul to be from a point on defendant's operating railway system (R. 66). The only provision in the contract for defendant to take over the road or any part thereof authorized this

action if the contractor refuses to perform the contract (R. 69). The contractor is made liable for all damages by fire started from the right of way, something inconsistent with operation of trains by another (R. 70); and is required to keep all buildings and structures insured "until completion and acceptance by the company" (R. 71); materials to be used by the contractor are to be delivered by defendant on a siding at its operated line (R. 97); the contractor is to align and ballast the road, and after the road is completed and settled under traffic a second adjustment is to be made. Not until all of this has been done will the road be accepted (R. 131); plaintiff's conduct of the commercial haul includes return of loaded cars "to the operated lines" of the company (R. 123); contractor shall handle material from defendant's operated line to material yards (R. 124). Equipment for these operations (exclusive of motor power) is to be furnished by defendant at a rental (R. 109).

We submit these stipulations do not leave to defendant one single operation of a train over this road until construction is completed, except for ballast; that this careful limiting of engine and car service by defendant to hauling ballast, coupled with like careful placing of every other burden of operation on the contractor forces the conclusion that the contractor was to operate the road and move such logs as were to be hauled before the completed road was delivered to defendant's operating department.

Defendant drew the contract (R. 192). If construction is necessary it will be construed against defendant.

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d) 1 (9th CCA).

That is the contract. It adds nothing to the argument to say that defendant acted foolishly in making it, or that the profit accruing to the contractor from the log haul is

large. Manifestly defendant underestimated the volume of commercial business, just as it underestimated the size of the entire job.

Defendant (Brief, p. 18) opens its discussion of the contract with the misleading statement that plaintiff asserts the right "to take and retain" possession of a railroad to be built "against the wish of the owner." This reverses the real position of the parties. Possession of the right of way was delivered to plaintiff by the contract—had to be delivered if the contract was to be performed—and defendant took from plaintiff an uncompleted part of the road in order to deprive plaintiff of the commercial haul, which was a part of the contract, at the same time ordering plaintiff to continue work on the remainder of the road. As we have noted above, the contract obligated plaintiff not only to construct, but to operate the line until construction was completed.

Plaintiff, under this contract, had possession of the road during construction, with the liabilities accompanying such possession.

Kansas Central Railway Company v. Fitzimmons (1877), 18 Kan. 34.

The court here had to determine liability between owner and contractor for a personal injury suffered upon an attractive nuisance. The contractor was operating during construction. Placing liability on the contractor, the court said, referring to the road:

(middle p. 39)

"During its construction it was properly in the charge of and under the control of the corporation having the contract for its construction * * *."

A construction contract implies right of possession in the contractor.

> *Williston on Contracts*, Sec. 1293 and Sec. 1318.
> *Weeks v. Rector of Trinity Church* (1900), 67 N.Y.S. 670, 672.

Such contract creates a relation akin to landlord and tenant (*Fiske v. Framingham Mfg. Co.* (1833), 14 Pick. (Mass.) 491, 493) and with the possession thus created, the landlord has no right to interfere.

> *Harris v. Keehn* (1919), 25 N. Mex. 447, 184 Pac. 527, 7 A.L.R. 1099, 1102.

Conduct of the parties is convincing that the trial court correctly construed the contract re log haul.

In soliciting bids defendant advised plaintiff there would be a log haul early in 1927; the Clearwater Timber Company expected to have its mill ready then and the road was to be ready to move logs concurrently; therefore rails were to be laid by June 1. (R. 225.) In view of the requirement in the proposal that all commercial business be conducted by contractor, this was a plain invitation to weigh the prospect of a log haul as soon as rail was laid. Otherwise, there was no reason to mention the haul. Defendant could stipulate time limits without mentioning the prospective haul.

The information had the effect apparently intended. Plaintiff reduced its hard rock bid from $1.07 per cubic yard to 99 cents. This made an estimated difference of $60,000 in the bid, which plaintiff hoped to recover on the log haul (R. 218).

Defendant charged no rental for cars used in commercial business (R. 212, 249).

Under date of August 3, 1926, defendant wrote asking plaintiff's permission to take over the *operation* of the line June 1, 1927, when the log haul would be ready (R. 211). It is important to note that there was no information to

plaintiff of purpose or decision, as stated on appellant's brief (see pp. 19-20, 35). The letter of defendant is illuminative. It discloses (1) that log movement was to begin at the very time indicated in the invitation to bid; (2) that defendant recognized the right given plaintiff by the contract to operate the line, and (3) that thus early (ten months before the log haul would be ready) defendant was asking plaintiff's consent to give up the log haul. In this connection we note that defendant did not then contend for a right it claimed, but, as stated by the chief engineer, wrote the letter of August 3 to develop what plaintiff's attitude would be (R. 232). Quite unnecessary, if defendant had a right to operate the road. We accept the concession that in August, 1926, defendant for the first time determined that it would haul the logs—an admission that when the contract was written and thereafter until the volume of the prospective haul became apparent both parties understood conduct of the commercial haul by plaintiff was one of the provisions of the contract.

Some days later when Mr. Twohy was in St. Paul on other business with defendant, the latter raised the question of log haul. Mr. Twohy was not on the construction job, although he visited Orofino frequently, and was there a couple of days after the Orofino office received the letter of August 3. He was on other business, and did not see the letter, and knew nothing of it until defendant opened the subject in St. Paul. At that time Mr. Twohy told defendant he knew nothing about the letter, and did not carry in his mind the terms of the construction contract, but whatever it provided would be satisfactory. This was the natural and proper answer under the circumstances. It was all any chief engineer could ask for if the contract gave defendant the rights now claimed. The answer of the chief engineer discloses a realization that the contract does give the plaintiff the commercial haul, and a determination to coerce plaintiff. He threatened use of his power as chief engineer—a power to destroy (R. 195, 212).

Mr. Stevens admits the accuracy of Mr. Twohy's testimony (R. 234).

On the train enroute west from St. Paul, Mr. Twohy was so alarmed by the threats of the chief engineer that he wrote the letter Ex. 32 (R. 196). It falls far short of a consent to an amendment of the construction contract. In it Mr. Twohy reserved his contractual rights, including price (R. 197). The most that can be claimed for it is that Mr. Twohy personally renewed his assent that the chief engineer is the umpire. We are not now discussing this letter as a claimed arbitration—that claim has been abandoned as to the log haul—but are discussing it as one of the facts to be considered in interpreting the construction contract. There is evidence that this St. Paul meeting was not treated by either party as decisive of the log haul right. In November, 1926, after the St. Paul meeting, Mr. Twohy and Mr. Boss were in the office of the chief engineer complaining of bridge troubles when the latter said "those fellows may make a whole lot of money" and Mr. Twohy responded that the chief engineer was probably referring to the log haul, but that was months off and the men would sink before then (R. 200). Mr. Boss thought the chief engineer made the statement re log haul (R. 215). The difference in recollection is a badge of truth. Later, in December, the chief engineer again referred to the log haul as a means of pulling plaintiff out of the hole (R. 216).

Plaintiff in fact conducted the log haul and all other commercial business until the wrongful taking of an uncompleted part of the road (R. 201, 209, 241).

The evidence is convincing that the minds of the parties met on the commercial haul, as found by the court, when the contract was made—denial by defendant came with realization of the volume of commercial business. It was so found by both the auditor and the court (R. 329).

Argument beginning at page 26 of appellant's brief that plaintiff's obligation was to conduct commercial business

until the track was acceptable to defendant has too many facts to overcome: (1) The court found the portion taken over was not completed, was not acceptable to defendant in its then condition because defendant continued the work plaintiff was doing, and was taken in bad faith to get the log haul (R. 168); (2) The contract is a unit to construct a road from Orofino to Headquarters, indeed that was one of the reasons assigned by the court for ruling out the construction claim (R. 160); (3) The entire contract negatives any right in defendant to take the road piecemeal; (4) Track work was not completed (R. 168) and work train service was continuing over the line taken by defendant (R. 224, 226). We think it unsound to argue that the right to the commercial haul was limited to the period of work train service and therefore defendant could terminate the right to the commercial haul by wrongfully terminating work train service.

The argument (Ap. Brief pp. 30-33) that defendant could demand less than full performance by plaintiff is beside the point. Could defendant take from plaintiff a part of its contract during satisfactory performance thereof, in order to deprive plaintiff of a profitable portion of its work, with resultant gain to defendant? If there is any virtue in contracts the answer must be negative. No amount of argument as to willingness of defendant to accept less than full performance can wipe out the court's finding (amply supported by evidence) of a taking in bad faith, before completion, of a part only of the road in order to deprive plaintiff of the commercial haul. There is no question of the obligation of defendant to *demand* anything—there is question of the right of defendant to take from plaintiff a portion of its contract.

At page 37 of its brief, defendant notes that when the supplemental contract was made in April, 1927, plaintiff failed to suggest that it "had been deprived or was about to be deprived" of the commercial haul. True, and convincing evidence that plaintiff had not yet been deprived of that

work, and did not know it "was about to be" so wronged. In view of the conversations between the parties in November and December, 1926 (this brief p. 18) we submit the absence of discussion of the commercial haul at the April, 1927, meeting confirms the position of plaintiff. It had been conducting such commercial hauling as developed. The log haul in quantity was in the future. It certainly did not know it was "about to be deprived" of that haul. There was no occasion to demand or claim that which the contract provided.

The so-called appeals for aid were in fact appeals for a right. Plaintiff had been short-estimated on its monthly accounts a large amount (R. 229-230); allowances in cash were for moving materials not named in the contract (R. 238, 242, 250) and for placing hewed timbers for which no price was fixed (R. 243). These claims had been frequently presented, and the chief engineer refused to pass on them.

We submit the contract expressly makes conduct of the commercial haul a part of plaintiff's duties and rights; that, if the contract is subject to construction, the conduct of the parties establishes an intention that the contractor should handle the commercial business until the road was completed.

II.

(a) The next contention of defendant re commercial haul is that even if the contract by its own terms or as interpreted by the parties gave to plaintiff the right to conduct the commercial haul until the road was completed, nevertheless by virtue of what is known as the "stop work" clause the defendant could do what it did. The full extent of the contention is reached on page 44 of appellant's brief where it is insisted that under the "stop work" clause defendant could take any part of the work away from plaintiff even though covered by its contract, and "make any substitute arrangement desired for the completion of the work."

The finding of the court is that when defendant took portions of the road from plaintiff the work required of plaintiff under its contract was not finished, plaintiff was progressing satisfactorily with it and the defendant did not in good faith intend to stop work, but took that portion of the uncompleted road from plaintiff in bad faith in order to obtain the profits of the commercial haul and deprive plaintiff thereof (R. 168).

It is important to bear in mind that work on this portion of the road was not stopped. It was taken from plaintiff in an uncompleted state and defendant itself finished the work.

We further note that the very order to stop work required plaintiff to continue work on other portions of the line (R. 165).

Other provisions of the contract indicate under what circumstances defendant was authorized to take over the work or any part thereof without stopping work. This right is confined to two situations, (1) where work is not progressing as fast as necessary, in which event defendant *may terminate the contract* and complete the work at the cost of the contractor (R. 68), and (2) where the contractor fails to perform its agreements set forth in the contract, in which event again the company may cancel the contract, take possession of and hold the road and materials and complete the work (R. 69). The stop work clause is intended for a very different purpose. It is to meet a situation where some unexpected happening makes it advisable to *cease* work. As stated in

Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co. (1901), 111 Fed. 695 (8th CCA)

near the bottom of page 696:

> "Such stipulations are sometimes found in contracts for the construction of railroads, and for the doing of

other work of like character where unforeseen events may occur to render a temporary or permanent suspension of work both desirable and necessary."

This does not deal with the taking of work from one person and giving it to another. It is made to meet situations that destroy the feasibility of the road, such as a road projected into a remote heavily timbered area and while the road is under construction the timber is destroyed by fire, or the financing for a railroad should fail so that payment for the construction became impossible. Many illustrations of like nature could be given. No such situation existed in the case at bar. The stop work clause was not used to stop the work in whole or in part. Indeed, the contractor was required to continue the work, not taken over by the defendant. The stop work clause was used as a vehicle to enable defendant to accomplish that which it had no right to do under the contract. It was used for the naked purpose of depriving plaintiff of the profits to accrue under the commercial haul provision of the contract and gaining for defendant both the profits of the haul and the saving effected by withholding from the contractor the remuneration which the contract provided for that haul. We submit the stop work provision can not be so used. We think that, under such provisions as this, defendant could not stop work on the first part of the road while demanding that the contractor complete work on the remainder of the road, and could not stop work at all without abandoning further construction, and certainly could not stop the contractor from doing a part of the work without in fact stopping the work, but in fact the company supplanting the contractor on the portion of the work thus stopped.

There has not been a great deal of law written on this particular subject. We assume the stop work clause has

not frequently been abused. We call attention to the fact that in the case of

Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co. (1901), 111 Fed. 695 (8th CCA)

construction was actually stopped and the contractor was endeavoring to obtain anticipated profits. It was not a case in which the company undertook to supplant the contractor.

All of the cases we have been able to find require that the utmost good faith shall be exercised in the use of this clause.

Wortman v. Montana Cent. Ry. Co. (1899), 22 Mont. 266, 56 Pac. 316, 320.

In this case a railway company stopped work under a clause which permitted it to do so (top second column, Pac. p. 318) "whenever, in the opinion of the party of the first part, it may be necessary to stop any of the work," the right to determine upon such necessity being vested in the chief engineer. The contractor alleged that work was only suspended temporarily and not stopped, and therefore it should have been permitted to complete the work at some future time, but the fact was developed (middle second column, Pac. p. 319) that no work was done after the stop work order, except some necessary protection work, which the contractor was permitted to do. The court held that the railroad company was within its rights in stopping work. Of the necessity of exercising good faith, the court said (bottom first column, Pac. p. 320):

> "while the chief engineer is named as the arbitrator whose judgment should determine that an exigency had arisen justifying the termination of the contract, yet it is clearly implied that this judgment should be exercised in good faith."

Louisville, E. & St. L. Ry. Co. v. Donnegan (1887), 111 Ind. 179, 12 N. E. 153, 157.

In this case the contract reserved in the company the right to cancel upon thirty days notice if the work was not being prosecuted properly. The company's engineer delayed the work and then took it over and prosecuted the same to completion. In holding the taking unjustified, the court said (bottom p. 157, of N. E.)

> "Those provisions of the contract must be given a reasonable construction. It certainly was not intended by the parties that the engineer in charge should arbitrarily, at any time, and without any sort or shadow of reason, take the work out of the control of appellees, and employ men at his pleasure."

The finding of the court in the case at bar that the taking was in bad faith for the purpose of depriving plaintiff of the log haul has support in statements of defendant's chief engineer. Prior to serving the stop work order he stated to Mr. Twohy that he was going to take the log haul (R. 200). That was the sole purpose of taking over this piece of road.

The proper application of such a stop work clause as this was determined squarely by the Supreme Court of Idaho.

Molyneux v. Twin Falls Canal Co. (1934), 54 Ida. 619, 35 P. (2d) 651, 655.

The contract, in this case to drive a tunnel, left to the employer the determination of the depth to which the tunnel should go, which was estimated at 2,000 feet, but it was to be driven until a satisfactory flow of water was obtained. Plaintiff received the contract to drive the tunnel, but when it proved profitable the employer stopped the work and then proceeded to finish it itself. The same defenses were offered there that are offered here by de-

fendant. The court construed the reservation of judgment as to depth of tunnel as one requiring the employer to permit the contractor to drill the tunnel to such depth as it was to be drilled. We quote (middle first column, Pac. p. 655):

> "If, at the time appellant ordered respondent to stop work, it intended to drill the tunnel any additional length and then or later should proceed with the tunnel without having previously in good faith and pursuant to the contract determined to terminate the tunnel, it was obligated to let the respondent do the work, and if it did not permit respondent to do such work appellant would, in such case, have breached its contract with respondent."

Appellant in the case at bar on brief asserts that this case is not in point because it did not deal with a stop work order in express terms. In this counsel is mistaken. The plaintiff in the Molyneux case pleaded an amendment to the contract by which it reserved the right to stop work at will. Of this contention the court said (middle second column, Pac. p. 655):

> "In respect to the allegation to the effect that the contract was modified to mean that work on the tunnel might be stopped by appellant at any time, we are again confronted with the conclusion heretofore expressed. It is not apparent that such a modification of the contract would authorize a termination of the contract until appellant had in good faith determined to terminate the tunnel."

The case is clear authority for the proposition that the stop work order means to stop work in good faith without intention of completing the work, and that it can not be used as a means of taking the work from the contractor and giving it to another.

The lower court clearly stated the meaning of the stop work clause, and that it would not cover situations where work was not in fact stopped, but the clause was used to deprive the contractor of a part of his work (R. 336). No authority is cited on appellant's brief on this point that deals with a situation where work was not stopped, but was taken from the contractor for another. We have cited on this brief all of the cases we have been able to find, and each of them denies the right to take possession of any part of the work and exclude the contractor therefrom, without in fact stopping the work or intending to stop the work. All of the cases recognize the office of a stop work clause. It is not to be used as it was used by the defendant in the case at bar.

A further provision of the contract negatives good faith use of the "stop work" clause. The contract requires a final estimate and payment for any work that is totally suspended (R. 70). No such estimate was made or tendered for the portions of the road taken. "Stop work" was but a means of acquiring the commercial haul.

(b) A second subdivision of defendant's argument on construction of the contract (pp. 48-56, Appellant's Brief) contends that plaintiff's right to conduct the commercial haul was limited to such business as defendant might accept, that defendant would not have accepted any of the log haul if it could not haul the logs itself, and that the contract lacks mutuality in that it was only a contract to haul such commercial business as the defendant might see fit to permit plaintiff to haul.

Defendant's argument is premised upon the proposition asserted on brief that there was no commitment by defendant to the Clearwater Timber Company to haul any logs at any given time. We think this statement is not justified. True, it was so asserted by Mr. Stevens, but there is evidence abundantly supporting a commitment. The contract between deefndant and Clearwater Timber Company, which was financially interested in construction

of the road, contemplated the hauling of logs during construction (R. 233). The letter of Mr. Stevens of August 3, 1926, admits that then, ten months before the log haul was due, he advised the Weyerhaeuser people (Clearwater) that the road would be ready to handle logs June 1, 1927 (R. 211). Many million feet of logs worth $10.00 per thousand were banked along the right of way by the Clearwater people in reliance on this assurance from defendant. The damage would be heavy if these logs were not moved during the year 1927 (Finding XV; R. 165, R. 243). Logs left in the woods during the first winter following the cutting suffer heavy deterioration (R. 249). We think there is ample support for the statement that there was a commitment to move these logs beginning June 1, 1927.

Now, the argument of defendant that it would not have received any logs for transportation if the transportation was to be handled by plaintiff under its contract, approaches too nearly a bad faith admission. It would involve (1) a confession that its obligation, moral, at least, to move these logs for the Clearwater Company before they were damaged would not be performed, and (2) a confession that its obligation to permit plaintiff to conduct the commercial haul during construction would not be carried out in good faith even though the commercial haul tendered to defendant was of the type it had at least morally committed itself to accept.

Defendant argues that the measure of damages adopted by the court can not be accepted because the court can not find that defendant would have accepted these logs to haul if plaintiff was to do the hauling. This quite overlooks the terms of the contract. The obligation of defendant was to permit plaintiff to conduct such hauling as was conducted, and defendant hauled many thousand car miles of logs. It can not be excused from its obligation because it failed to convince either plaintiff or the court that its construction of the contract is correct. The contract is not that

plaintiff may haul such logs as defendant sees fit to permit plaintiff to haul. The contract is that plaintiff shall be permitted to conduct all commercial hauling that is conducted over the line until the road is completed. That difference in contract is the difference between an illusory contract, or one lacking mutuality, and the contract between plaintiff and defendant. A contract where one party agrees to sell to another the production of his mine, or of his oil well, or to supply his necessities, or to conduct all hauling that may be conducted in a particular locality, does not lack mutuality, but entitles the other party to have all ore that is produced, or all oil that is produced, or to conduct all hauling that goes over the line. This court and other federal courts have had occasion to pass upon the question many times, and uniformly have ruled that a contract like that under consideration requires (1) perfect good faith in conducting the business, the product of which is to be sold to or handled by another, and (2) the delivery or permitting of the service by the other to the exclusion of all other persons.

Miller v. Robertson (1924), 266 U. S. 243, 252, 69 L. ed. 265, 272.
Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co. (1917), 239 Fed. 603, 606 (7th CCA).
T. W. Jenkins & Co. v. Anaheim Sugar Co. (1918), 247 Fed. 958, 960 (9th CCA).
Imperial Refining Co. v. Kanotex Refining Co. (1928), 29 F. (2d) 193, 195 (8th CCA).

All of the foregoing cases discuss the question of mutuality and point to the distinction which clearly exists. The opinion in *Imperial Refining Co. v. Kanotex Refining Co., supra,* reviews many cases from the federal and state courts. Uniformly where the contract is that one party shall handle or purchase, etc., all of a certain article the other may produce, or that passes over the road, etc., it is held to be a valid and binding contract.

The case of *Dennis v. Slyfield* (1902), 117 Fed. 474 (6th CCA) illustrates the other kind of situation where the only agreement is that one party may carry such freight as the other party sees fit to give him. This is an illusory contract. It is not to be confused with a contract permitting one party to haul all freight that goes over the road during a stated period.

We have discussed defendant's argument regarding the measure of damages (Ap. B. Page 51), despite the fact there is nothing in the record to present it. As we noted early in this brief (page 10) defendant reserved no exception to finding XVIII (R. 169). In this finding, the court determined the measure and amount of damage for breach of contract regarding the commercial haul. Without an exception to this finding, we deem further discussion of this point a work of supererogation.

III.

Defendant's third position re commercial haul is that it had the right to take the log haul from plaintiff under the "change of work" provision of the contract. The argument is mixed with the argument on the stop work clause (Appellant's brief, p. 45), but involves an essentially different proposition. The provision of the contract relied upon reserves in the company the right "to change in whole or in part, as it may deem expedient, the line and grade of the railroad, or the amount of work embraced in this contract" (R. 72). This clause is common to construction contracts—more frequently found in contracts to construct buildings or structures than in contracts to build railroads. Its meaning is well known and has been defined by the courts. It permits a change in the plans and omission from the entire job of some particular specified work, etc., but does not permit the owner to take work away from the contractor and give it to another or perform the work itself. The first case of which we have

knowledge, construing a clause such as this, is *Clark v. Mayor of New York* (1850), 4 N. Y. 338.

A contract to construct an aqueduct permitted the employer to make alterations in the form, dimensions or materials of the work. Under the contract the employer permitted the contractor to perform the expensive part of a particular piece of work, and then took the work away when there was an inexpensive part left to finish that would prove profitable. Referring to the provisions for alterations, the court said (p. 342):

> "But this provision, although it gave the commissioners power to direct in good faith any change in the form or dimensions of the work, did not authorize them to stop the work in an unfinished state and thus arbitrarily annul the contract."

Shaver v. Murdock (1868), 36 Cal. 293, 297.

A contract to erect a building authorized the owner to make alterations, deviations or omissions. A part of the work by agreement was performed by another. The question involved was whether completion of that part of the work performed by the contractor prematurely shortened the time for lien claims. Rejecting proof of the meaning of "omissions" in contracts of this nature, i. e., that it does not mean "something which the owner may take off the contractor's hands and performed or finish for himself", the court said (top p. 297):

> "The terms of this subdivision of the original contract, when read in connection with other provisions of the same contract, are plain and simple, and the language, employed in its ordinary sense, most clearly leads to the construction claimed by plaintiff without the aid of extrinsic evidence; hence the rejection of evidence tending to explain the simple meaning of a term, or render more apparent the construction of a sentence which was already sufficiently clear, was not error."

Gallagher v. Hirsh (1899), 61 N. Y. S. 609, 613, 45 App. Div. 467.

Here a builder claimed the right to deduct from the contractor's remuneration money paid to another for a portion of the work included in the contract. Relying upon language like that found in the contract in the case at bar, in a clearly reasoned opinion, the court ruled a provision such as this did not permit the taking away from the contractor of work which was not omitted from the entire job. (Bottom p. 613, N. Y. S.):

> "The court charged the jury that the defendant had no right to take away any part of the plaintiff's contract, and give it to another without the plaintiff's consent. This, we think was a correct interpretation of the clause in question. It is evident that under the word 'omissions' were intended to be included those things which were abandoned and left out of the plaintiff's contract, and not such as were taken out of the plaintitff's contract, and given to another to be performed. The word 'omissions' did not mean omitted from the plaintiff's contract, but omitted from the work, and clearly could not be construed to have allowed the defendant to take two-thirds of the work from the plaintiff, and then compel him to perform the rest. The words are, 'additions or omissions from said contract,' evidently meaning additions to or omissions from the work to be done under said contract, which clearly negatives the idea that they were intended to mean that the defendant should have the right to omit the work from the plaintiff's contract, in order to give the contract to another to do the same thing."

Defendant on brief in this court has not cited a single authority to support its argument that a reserved right to change plans or change the contract or the work would give it the right to take work away from the plaintiff and per-

form the work itself,—to take work covered by the contract from plaintiff without eliminating it from the job. In the court below, however, counsel cited and relied upon a single decision which we shall refer to in order that we may have given the court all of the authority we have found upon the subject, and also in order that we may discuss this case while we have an opportunity:

Marsch v. Southern New Eng. R. Corp. (1918) 230 Mass. 483, 120 N. E. 120.

A number of separate actions against railroad companies which had organized a "paper railroad company" to construct a railroad for them, were involved in this one decision. The contract contained a provision giving the railroad company the same rights that are given by the provision of the contract under discussion in the case at bar. Plaintiff contended that certain work had been taken from it and given to another. Without any discussion of the law or citation of authority the Massachusetts court (N. E., p. 124) ruled that this provision of the contract would permit the railroad company to take the work from the contractor and give it to another. The ruling is in direct conflict with that in the cases cited above on this brief, which are reasoned. We submit that they correctly construe the language involved and that the Massachusetts decision should not be followed. We are strengthened in this view by the history of this litigation.

The case in 120 N. E. went up upon rulings on the pleadings. When the decision of the Massachusetts court was entered, plaintiff in that case immediately dismissed in the state court and instituted his action anew in the federal court. We know this because his right to discontinue was upheld (*Marsch v. Southern New Eng. R. Corp.* (1920) (Mass.) 126 N. E. 519). In the federal court Marsch recovered a judgment for upwards of $622,000, which was affirmed on appeal (*Southern New Eng. R. Corp. vs. Marsch* (1931) 45 F. (2) 766 (1st CCA). The

litigation next appears in a decision involving the receivership of the Southern New Eng. R. Corp. (*Central Vermont R. Co. v. Southern New Eng. R. Corp.* (1932) 1 F. Supp. 1004 (D. C. Mass.)). That case involved the right to fasten the liability of the judgment specifically referred to upon the railroad companies which organized the paper company. The court had occasion to refer to the decision in the state court which preceded the judgment in the federal court. The receivership decision was appealed, the opinion of the appellate court being reported as *Central Vermont R. Co. v. Marsch* (1932) 59 F. (2d) 59 (1st CCA). This case recites the history of the litigation to some extent, and notes (p. 60) that the original Marsch judgment in the federal court for upwards of $622,000 was rendered in June 1930, and affirmed in 45 F. (2) 766.

In view of the different result obtained in the federal court in the litigation between Marsch and the Southern New England Railroad Corporation, coupled with the lack of reasoning in the decision of the Massachusetts Supreme Court, we submit that the case of *Marsch v. Southern New Eng. R. Corp.* (1918) 230 Mass. 483, 120 N. E. 120, is not sound and should not be followed.

A contractual provision permitting the owner to change the plans or omit from the contract or the work, has a well recognized meaning that does not include taking work from the contractor without omitting the work. To permit that would permit destruction of all contractual rights under a construction contract.

THE BRIDGE MATERIAL HAUL

In appealing from the judgment of the lower court respecting the prices to be paid for hauling bridge materials, defendant has combined its discussion of the express language of the contract and the construction thereof by the parties (Brief, 57-64). In addition to contractual

construction, the contention is offered by defendant that the matter could be submitted to the chief engineer, that it was submitted, and a binding ruling made.

We believe it will aid the court to discuss the contract first upon its terms alone, and present a separate discussion of evidence aliunde the contract itself.

Defendant's entire argument with respect of the meaning of the contract on its face is premised upon the provision in the specification for bridge construction, limiting "team haul" to four miles (R. 108).

This is the only place in the entire contract where the words "team haul" appear. This is significant because this limitation in the manner of performing the physical work is claimed to affect the stipulated prices. This clause apparently has nothing to do with prices. It does not suggest that the prices fixed elsewhere in the contract shall be limited to team haul, or that the fact of hauling by team shall in any way affect the prices named. We think it deals with an entirely different subject. Speed of construction is written large on the contract, and manifested throughout its performance (R. 243). The material yard was located at Orofino on the operated line of defendant (R. 260). That it was to be located on the main line is clear from many of the contract provisions. The contract provides in all instances that materials furnished by the company shall be delivered on its operated line nearest the material yard. (R. 66, 97, 124). Therefore, when the contract was written, both parties knew that the plaintiff must haul the materials from the operated line to the point on the line under construction where such materials would be used. Limiting the team haul to four miles would compel laying of track from the lower end of the road as rapidly as grade was thrown up, thereby speeding delivery of materials for bridge building. This is, we submit, the only significance of the paragraph with respect of team haul.

Other provisions of the contract cogently sustain this proposition. Prices to be paid for work are all in one location in the contract.

"The prices to be paid by the Company for the work are as follows:" (R. 56).

* * *

"Hauling for concrete pipe, per ton per mile... 0.65
Hauling for corrugated iron pipe, per ton per mile 0.85
Hauling piles furnished by the Company, per lineal foot per mile 0.02
Hauling timber furnished by the Company, per thousand, F.B.M., per mile 0.85
Hauling metal fastenings, per ton per mile.... 0.65" (R. 59-60).

These are the prices and the only prices named in the contract for this hauling, which was known when the contract was written to be from the operated line of defendant to the point where the materials would be used. These prices apply only to materials furnished by the company, excluding local timbers, piles, etc., obtained on the ground, which is covered by separate items. Metal fastenings are to be furnished by the company (R. 58), and corrugated pipe is to be furnished by the company (R. 59). Indeed, all material entering into permanent construction of the line was to be furnished by the company (R. 133). Defendant argues that plaintiff was not engaged to do hauling work (Brief 59), but this hauling was an essential part of the construction work. Plaintiff did not contract merely to throw up grade, lay rails and place bridge timbers delivered to them ready for erection, but its contract covered the moving of these materials from the operated line of the company. These materials were not commercial business. We would think the term "commercial business" is sufficiently clear without extrinsic evidence. With respect of transportation, it is business produced by others against whom a charge can be made. The hauling here

involved, however, consists of the very materials covered by the construction contract, produced, not by others, but by the defendant, a party to the contract, and its hauling was a part of the construction. Indeed, we think the language of the contract excludes this material haul from Item 72 upon which defendant relies. Item 72 fixes a price for hauling commercial business, material and empty cars of the company *used in commercial service* and in the service of other contractors. (We note that the italcised words were eliminated on defendant's brief p. 59, in quoting this provision). This item by its very terms is limited to cars used in commercial service and in the service of other contractors (R. 63). The succeeding item 73 covers every other item of hauling, except the hauling of materials to be used by plaintiff in performing its contract. This item fixes a price of $10.00 per car for handling cars of material between the operated line and the material yard, *exclusive of the contractor's own material and that covered by the contract with defendant.* The contract between plaintiff and defendant clearly does include the hauling of bridge materials to be used in the contract and the only price specified therefor is the price for which judgment was given by the lower court.

Considerations outside the express, and, we believe, exclusive, language of the contract fixing prices for this service, are convincing that the judgment of the lower court is right. The court had before it evidence that on the morning of October 15, 1925, in St. Paul, plaintiff submitted its bid to defendant and was advised at noon that the contract had been awarded to plaintiff. During the afternoon of that day a number of price items were discussed and changed at the request of the chief engineer of defendant. During the discussion plaintiff's superintendent called defendant's attention to the fact that team haul was mentioned in only two items (R. 259), those dealing with concrete pipe and corrugated iron pipe (R. 59). The suggestion was made because plaintiff wanted

it clearly understood that the manner of hauling would not affect the price. Thereupon the defendant struck out the words "team haul" and inserted in lieu thereof the word "hauling" (R. 261). This action speaks for itself and we think effectually commits the parties to the proposition that these prices named in the contract applied to transportation of bridge materials by any means whatsoever.

Campbell v. Trustees Cincinnati Southern Ry. (1888) 9 Ky. L. Rep. 799, 6 S. W. 337, 338.

Defendant argues on brief that there was no finding on the subject of the effect of this change (R. 63). In this counsel is in error. In the form suggested such finding would be purely evidentiary. The finding of the court is that the contract stipulated the prices claimed, and that finding covers all of the evidence to support the finding. The intent of the change is clear on its face.

Other considerations are convincing. No charge was made for cars used in hauling commercial freight (R. 212, 249). If this material haul was to be considered as commercial haul where moved by rail (and that is the contention of defendant) then there would be no rental charge for the cars used in hauling these materials by rail. But plaintiff was charged a rental for cars used in this service, clearly marking it as other than commercial haul (R. 260). A further consideration is that the plaintiff did not have the burden of loading and unloading any commercial freight. The shipper loaded the cars and the cars were then moved by plaintiff on instructions of defendant's resident engineer (R. 212, 224, 241, 248). But in handling the articles constituting the material haul, there was a heavy burden imposed upon plaintiff in sorting, loading and unloading the cars. The stipulated prices were not sufficient to cover the cost of this work as to some of the material moved (R. 260-261). The metal fastenings were all types stipulated in the contract, the moving of which would not require much sorting, but bridge timbers, piling,

etc., would depend upon the requirements of each specific bridge; also they are much heavier articles, difficult to load, requiring more men and mechanical force, all of which explains the difference in price in hauling the various articles (including the handling) whether by rail, truck or otherwise. The prices did not cover merely the cost of moving a car by rail, as suggested by defendant.

Defendant's further discussion of the bridge material haul is divided into two parts on brief, opening with the assertion of a submission and ruling (Brief p. 66), and closing in the second section of the argument with a discussion of what amounts to a submission and ruling (Brief, p. 76).

We think we can be of better assistance to the court if the several points involved in these contentions are separated. We shall discuss, first, whether there was a submission at all, second, whether the question is one that could be submitted, and, third, whether there was a ruling of a nature that would be binding upon anyone.

(1) *In limine* defendant is confronted with the fact that the court found that there was not a submission of this matter to the chief engineer, and that any ruling claimed to have been made by that officer was arbitrary and coercive. His finding was in accord with the conclusions of the auditor (R. 329).

We challenge defendant's statement, which is repeated a number of times during the argument, that demands were made, or a dispute or misunderstanding or disagreement existed between plaintiff and defendant's resident engineer with respect of the material haul prices. The facts are that in August 1926 plaintiff called the attention of the resident engineer to an omission in making the July estimate; he overlooked material haul items on bridge No. 1, which apparently had been under construction in July. Plaintiff requested that the amounts be included in the

August estimate (R. 269). There is in this no demand of any kind. It was such a letter as would have been written had any portion of the work performed in a month been overlooked in making the estimate. The answer to this is significant. The resident engineer acknowledged receipt and stated he had referred the question to Mr. Stevens (R. 270). Now then, insofar as the only request was that an omission from the estimate be inserted in the succeeding estimate, we submit that no one can read into these two letters a disagreement, dispute or controversy of any kind as to the *prices* to be paid. These were stipulated in the contract. The resident engineer did not suggest any disagreement as to price. The question involved was whether the work omitted from the July estimate should be included in the August estimate. The resident engineer does not indicate that he is in disagreement in any respect with plaintiff. We were not favored with the letter of the resident engineer referring this matter to the chief engineer, and do not know whether he agreed with plaintiff and merely requested authority to include in the August estimate the matter overlooked in the July estimate. The record is barren of anything to show any disagreement. The witness, however, did testify that after the alleged ruling by the chief engineer, witness doubted the applicability of the commercial haul rate (R. 271-272).

The provision of the contract upon which defendant relies permits the chief engineer to act as umpire to decide any disputes or misunderstandings that may arise in the course of the work (R. 55-56). We say no condition had arisen justifying resort to the umpire.

We further say that a submission of a dispute of this nature must be by joint action of the parties concerned.

(2) Aside from the fact that there was no dispute or misunderstanding and no submission such as is contemplated by arbitration provisions of contracts, the question involved was one that could not be committed to the chief engineer, and was not intended to be committed by the

contract between the parties. There is no question of the right of parties to contract that all questions of a technical nature, such as classification, measurement, manner of doing work, sufficiency of work performed, etc., may be submitted to a designated arbitrator and his decision made final. Neither is their question but what the judgment of a designated person may be conclusive as to whether extensions of time should be granted, whether a contract has been performed, etc., but there is a well established distinction between such matters and those that deal with questions of law. The latter may not be made the basis of submission to an engineer. Decision of such matters is reserved for the courts.

A stipulation to submit all matters arising during performance of the contract to decision of the engineer (if interpreted to include questions of law as to what the contract is and the rights of the parties thereunder) is against public policy because it invades the province of the court.

Haskell v. McClintic-Marshall Co. (1923) 289 Fed. 405, 409 (9th CCA).

Passaic Valley Sewerage Commissioners v. Tierney (1924) 1 Fed. (2d) 304, 307 (3rd CCA).

Ray v. Luzerne County (1932) 58 F. (2d) 829, 830 (D. C. Pa.)

National Contracting Co. v. Hudson River Water Power Co. (1908) 192 N. Y. 209; 84 N. E. 965, 969.

Barron v. Burnside (1887) 121 U. S. 186; 30 L. Ed. 915, 919.

Tribble v. Yakima Valley Transp. Co. (1918) 100 Wash. 589, 171 Pac. 544, 549.

Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 Idaho 5; 93 Pac. 789, 795.

Wortman v. Montana Central Ry. Co. (1899) 22 Mont. 266, 56 Pac. 316, 320.

Whether the contract specified the prices claimed, or something different, had nothing to do with those matters that would arise during work of a technical nature that

should be decided on the ground. The question involved was one of law, upon which plaintiff's right to a decision of the court that could not be cut off by any action of the chief engineer.

Furthermore, any decision of the chief engineer contrary to the contract would be void. Even as to matters held to come within the purview of the arbitration clause, the engineer is not permitted to decide contrary to the express terms of the contract.

Ahrens v. City of Reading (1918) 261 Pa. 100; 104 Atl. 511.
Dyer v. Middle Kittitas Irr. Dist. (1905) 40 Wash. 238; 82 Pac. 301, 302.
Mills v. Norfolk & Western R. Co. (1894) 90 Va. 523; 19 S. E. 171, 173.
Williams v. Mt. Hood Ry. & Power Co. (1910) 57 Or. 251, 259; 110 Pac. 490.

In the language of the court in the case of *Mills v. Norfolk & Western R. Co., supra,* denying the contention that the engineer may decide contrary to the express language of the contract (top. p. 173, of S. E.):

> "* * the predication is that, though the price is fixed by the contract, it emasculates itself,—commits felo de se,—and makes the engineer the absolute, final, and arbitrary dictator of the price or rate of compensation which the contractors shall receive * *."

Such is the holding in two of the cases cited by defendant on brief.

The court in *Memphis Trust Co. v. Brown-Ketchum Iron Works* (1909) 166 Fed. 398 (6th CCA) ruled (p. 406) that an umpire to whom matters were formally submitted could not decide contrary to the agreement, and that the decision would be set aside insofar as it was so contrary.

In *Corporation of Charles Town v. Ligon* (1933) 67 F. (2d) 238 (4th CCA) the court in sustaining provisions for arbitration of disputes ruled (bottom first column p. 244) that the lower court was correct in construing the contract differently than it had been construed by the arbitrator and the trial court was sustained in allowing payment based upon a proper construction of the contract.

The long list of cases cited by defendant on brief in connection with arbitration disclose defendant's failure to distinguish between the kind of questions that can be committed to arbitration by contract before work begins, and the questions of law that may not be so committed. Without discussing these cases severally, because it would require too much space, they may be readily divided into classes into more than one of which some of the cases fall. No one of them upholds the right to submit to an arbitrator questions of law such as here involved.

(1) One of the cases involved the right of an engineer to terminate a contract and refuse extension of time where that power was reserved and made to rest entirely in the judgment of the engineer. It involved a question of fact. In this very case however those matters of law involved were determined by the court.

United States v. Gleason (1900) 175 U. S. 588; 44 L. ed. 284.

(2) Of the cases cited by defendant, the following are all cases which involved questions of fact of a technical nature properly left to a technical man.

McCullough v. Clinch-Mitchell Const. Co. (1934) 71 F. (2d) 17, 21 (8th CCA).

Chicago, Santa Fe & California R. Co. v. Price (1891) 138 U. S. 185, 34 L. ed. 917.

Ripley v. United States (1912) 223 U. S. 695, 56 L. ed. 614, 619.

Merrill-Ruckgaber Co. v. United States (1916) 241 U. S. 387, 60 L. ed. 1058.

Kennedy v. City of White Bear Lake (1930) 39 F. (2d) 608, 610 (8th CCA).
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).
Smith v. Copiah County (1916) 239 Fed. 425 (D. C. Miss.)

(3) In the following cases cited by defendant, the court in fact construed the contract, in some of the cases agreeing with the engineer, and in others disagreeing:

Kihlberg v. United States (1878) 97 U. S. 398, 24 L. ed. 1106.
Merrill-Ruckgaber Co. v. United States (1916) 241 U. S. 387, 60 L. ed. 1058.
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).
Corporation of Charles Town v. Ligon (1933) 67 F. (2d) 238, 244 (4th CCA).
Smith v. Copiah County (1916) 239 Fed. 425 (D. C. Miss.)

(4) In the following cases cited by defendant that portion of the decision of the engineer dealing solely with a question of fact was sustained, the court construing the contract in other respects:

Kihlberg v. United States (1878) 97 U. S. 398, 24 L. ed. 1106.
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).

(5) And the following case was one in which advance ruling of the chief engineer on a question of fact was essential to the presentation of a claim:

United States v. Mason & Hanger Co. (1922) 260 U. S. 323, 67 L. ed. 286.

In no one of the cases cited by defendant was there involved a failure to extend full right of hearing to either side; no one of them involved an arbitrary ruling without

hearing what the claimant may have had to present, with full opportunity of presentation; no one of them involved a question of law such as is presented here; no one of them sustained a decision contrary to the express terms of the contract.

We submit that the correctness of the law laid down in these cases may be admitted without in any degree depreciating the authority of the decision of this court in the case of *Haskell v. McClintic-Marshall Co., supra,* that an attempt by contract to deprive a party of his right to a court decision on questions of law is against public policy. In that opinion the court cited a construction contract case.

The case of *McCullough v. Clinch-Mitchell Const. Co., supra,* which did not involve the submission of legal questions to an engineer, nevertheless clearly limits contractual requirements for arbitration to matters of a factual nature. The reasoning of the court confirms what we have been trying to state (bottom second column, p. 21, of 71 F. (2d)):

> "All construction contracts involve matters as to character of materials, of work, and of methods of doing the work. Determination of such is necessarily a matter of judgment and often the diverse interests of the parties cause difference of opinion with resulting disputes concerning them. It is to the interest of all parties that these disputes be promptly determined and by some one having special knowledge of such matters and who can act upon personal knowledge of the controlling facts. With this decided and well recognized usefulness, if not necessity, for such arrangements in construction contracts and with the complete provision as to arbitration with the above waiver clause eliminated, we can not believe that the parties here had in mind that arbitration would be undesirable if decisions thereunder did not bar legal remedies.'

Incidentally, the case clearly holds that the contract for arbitration is not a submission; that the parties must agree to the submission when disputes arise. It is not an unilateral act, as defendant seems to think.

A like ruling is made in *Corporation of Charles Town v. Ligon* (1933) 67 F. (2d) 238, 244 (4th CCA). At page 244 the court rules that even though the engineer decided a $1,200 item assertedly under the arbitration clause, the matter had not been submitted by the parties for arbitration. This means submission by both parties—the town had submitted and was defending the submission.

(3) We think there can not be a submission or decision where the engineer acts arbitrarily and without opportunity for hearing. By opportunity for hearing, we mean a hearing at a time when representatives of either side may have the subject in hand and be prepared to present at least their contentions.

The circumstances under which this decision was made mark it as arbitrary and coercive. Mr. James F. Twohy was secretary of plaintiff. He was not on the job at Orofino but was looking after outside work in connection with that job. Mr. Twohy went to St. Paul in connection with finances for this particular job, obtained an advance against the retained percentage and was about to leave, when the chief engineer on his own motion raised two questions: (1) the log haul, which was far in the future, and (2) the prices to be paid for the material haul (R. 212). The chief engineer admits that he himself raised the question and immediately ruled that he would not pay the contract prices (R. 234). Now, at this time, Mr. Twohy knew nothing about the exchange between plaintiff's superintendent on the job and the resident engineer and did not have in his mind the terms of the contract. He was in no position to discuss the matter or to present any arguments in behalf of plaintiff. He did all that he could do under the circumstances,—expressed a willingness to abide by the contract. The chief engineer, being advised

by Mr. Twohy that the latter did not have in hand any information on the subject, offered no opportunity for an informed presentation by plaintiff, but ruled out of hand as to what he would do, and then proceeded to state that plaintiff could *consider that matter settled.* His statement was preceded by a threat of the use of his power as chief engineer if plaintiff saw fit to demand that which the contract gave him a right to demand.

For the engineer to thus himself raise a question of this nature in order that he may decide it without hearing is itself such misconduct as disqualifies him to rule.

> *Maysville, W. P. & L. Turnpike Road Co. v. Waters* (1837) 6 Dana (Ky.) 62, 67.

For him to rule, however the question is raised, without an opportunity for hearing, again marks him as disqualified in the premises.

> *Marks v. Northern Pacific R. Co.* (1896) 76 Fed. 941, 946 (9th CCA).

Defendant argues on brief that a hearing is not necessary. Assuming that a hearing involves producing witnesses, etc., he admits that *9 C. J. 770* states the general rule that a hearing is necessary, but claims that the supporting cases have been overruled. In this we think counsel is mistaken. The leading case on the subject is yet

> *McMahon v. New York & Erie R. Co.* (1859) 20 N. Y. 463, 466.

Defendant says (Brief p. 77) that this case was overruled by the case of *Sweet v. Morrison* (1889) 116 N. Y. 19, 22 N. E. 276. We think defendant is in error. The court in that case ruled that the parties by their conduct had waived the right to a hearing (the decision was so construed in the later case of *Stefano Berizzi Co. v. Krausz* (1925) 239 N. Y. 315, 146 N. E. 436, where the court

points the distinction with respect of technical matters that may be submitted to an engineer). A hearing was in fact held in the case of *Sweet v. Morrison, supra,* the complaint being that the arbitrator did not personally measure the work and refused to permit the plaintiff to call witnesses to disagree with the measurements made by the arbitrator's agents. The litigation was between the contractor and a subcontractor.

Defendant further says that the early case of *Korf v. Lull* (1873) 70 Ill. 420, specifically overruled the Illinois case cited by *Corpus Juris.* But in the case of *Korf v. Lull, supra,* the quarrel was not between the parties to the contract, but between a subcontractor and the builder. The court found there was no dispute. The question was finality of the architect's certificate accepting the building—the kind of decision that rests in the architect's judgment.

Later Illinois decisions require notice where a dispute exists.

Young v. Wells Glass Co. (1900) 189 Ill. 626, 58 N. E. 605.

The general rule is that a contract providing for arbitration can be complied with only by a fair opportunity for hearing.

Morse, Law of Arbitration and Award, p. 117.
Page on Contracts, Sec. 2536.
Slater v. LaGrande Power Co. (1903) 43 Or. 131 72 Pac. 738.
Marks v. Northern Pacific R. Co. (1896) 76 Fed. 941, 946 (9th CCA).
Curran v. City of Philadelphia (1919) 264 Pa. 111, 107 Atl. 636, 639.
Meloy v. Imperial Land Co. (1912) 163 Cal. 99, 124 Pac. 712.

This contract in respect of the umpire provision is the ordinary agreement to submit to a named arbitrator such disputes as may arise and calls for a fair observance of the

rules governing arbitration. The common law rule of arbitration undoubtedly requires notice and an opportunity for hearing. It will not do to say that this is not an arbitration clause. It is captioned in the contract "Arbitration"

The Supreme Court, however, in *Red Cross Line v. Atlantic Fruit Co.* (1924) 264 U. S. 109, 68 L. ed. 582, 587, ruled that where there is an agreement to submit to arbitration and the agreement does not provide the machinery, the arbitration must proceed according to the state law, if there is a state law on the subject.

At the time this contract was being performed the state of Idaho had a law governing arbitration proceedings, as did the state of Oregon. As we read this law, it requires a formal hearing. We quote two of the sections of the Idaho Code annotated:

Sec. 13-904

> "Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to adminster oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon."

Sec. 13-905

> "All the arbitrators must meet and act together during the investigation; but when met a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding."

Defendant cites on brief, as opposed to the wealth of authority to the contrary, the case of *Norcross v. Wyman* (1904) 187 Mass. 25, 72 N. E. 347. The case, however, involved one of those technical matters which the engineer

decides on the ground. He ruled that a material encountered was quicksand, not covered by the contract, and required extra work and expense.

The threat of the chief engineer of defendant, coupled with his arbitrary ruling, is alone sufficient to destroy its validity. Under those circumstances, continuing with the work and reserving for a court the question of the compensation provided in the contract is not acquiesence on the part of plaintiff.

United States v. Smith (1921) 256 U. S. 11, 65 L. ed. 808, 810.

Here a request for extra compensation because unexpected material was encountered was rejected and reprisals threatened. To the contention that the decision of the engineer and acceptance of pay thereunder was final, the court said (middle p. 810, of L. ed.):

> "The contention overlooks the view of the contract entertained by Colonel Lydecker, and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, 'though perhaps without malice or bad faith in the tortious sense,' was repellent of appeal or of any alternative but submission with its consequences."

The court will recall that the chief engineer of defendant in raising and announcing a ruling on this material haul foreclosed any further suggestion or argument from plaintiff. That such coercion prevents a claim of acquiesence, estoppel or waiver, has been held too frequently to require argument.

Union Pacific R. Co. v. Public Service Commission (1918) 248 U. S. 67, 63 L. ed. 131, 133.

Panther Rubber Mfg. Co. v. Commissioner of Internal Revenue (1930) 45 F. (2d) 314, 316 (1st CCA)

A wealth of authority is gathered in a note in *79 A. L. R. at page 657.*

Now, it was after this coercion that Mr. Twohy, suffering from the fear and worry caused thereby, enroute home from St. Paul wrote by hand the letter so much relied upon (R. 196-198). As we have heretofore pointed out, the letter in no sense amends the contract (if a secretary of a corporation, without any authority from his company, could amend the contract) and waives nothing; indeed, expressly reserves the rights provided in the contract, both as to duties and prices (R. 197). If it did more, the circumstances under which it was written would deny to defendant the right to claim anything therefrom.

The letter does attempt to leave to the chief engineer the decision of the questions of law involved in the contract. This court is definitely committed to the proposition that such an effort is against public policy (this brief p. 40). Being against public policy, it can not be effected by a letter written after the contract was drawn, any more than an effective provision of that nature could be written into the original contract.

Cecil B. DeMille Productions v. Woolery (1932) 61 F. (2d) 45, 49 (9th CCA).

Hall v. Coppell (1869) 74 U. S. 542, 19 L. ed. 244, 248.

Public policy can't be defeated by alleged acquiesence or consent after the contract is written. This would permit a contract contrary to public policy to be validated the day after it was written.

CONCLUSION

We submit:

(1) That the court properly ruled that plaintiff was entitled to conduct the commercial haul until the road was completed, and was damaged by the breach; we contend that the award on this item should be increased as claimed on plaintiff's cross-appeal.

(2) That the court properly ruled that plaintiff should be paid the prices stipulated for hauling bridge materials; we contend that the award on this item should be increased by the allowance of interest as claimed on plaintiff's cross-appeal.

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No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,
v.
TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

REPLY BRIEF OF TWOHY BROTHERS COMPANY AS CROSS-APPELLANT.

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

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No. 8594

IN THE

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FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

REPLY BRIEF OF TWOHY BROTHERS COMPANY AS CROSS-APPELLANT.

We continue reference to Twohy Brothers Company as plaintiff, and to Northern Pacific Railway Company as defendant.

Defendant asserts (1) plaintiff's bill of exceptions is insufficient, and (2) no formal ruling was made by the trial court rejecting as representations of amount and character of work the evidence of representations upon which bids were invited. On the face of the record, defendant is in error as to (2), and, we submit, is in error as to (1).

(1) Rule 10, subdivision 2, of this court, is the same as rule 8 (formerly 7) of the Supreme Court. These rules call for the common law bill of exceptions (*Krauss Brothers Lumber Co. v. Mellon* (1928), 276 U.S. 386, 72 L. ed. 620, 622). The proper composition of such bill is explained in *Lincoln v. Claflin* (1868), 74 U.S. 132, 19 L. ed. 106, (top of second column, p. 108, L. ed.)

> "If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them."

This court has admonished the bar to refrain from imposing on the court the burden of searching through all of the evidence when such search is not necessary to present the legal point on appeal (*Metzler v. United States* (1933), 64 F. (2d) 203, 209).

On plaintiffs' first assignment the court is interested in the evidence rejected and that there was evidence pointing its materiality—not all the evidence, or the weight of evidence, but whether there was any evidence making the rejected evidence material.

Plaintiff's second assignment (error in limiting recovery on commercial haul) again called for a showing of evidence requiring a construction of the pleadings, not all the evidence, but the fact that there was such evidence. Plaintiff's second, third and fourth assignments could be presented without any bill of exceptions. Without a bill consideration of the second assignment would be limited to the primary record. (*O'Brien's 1937 Supplement*, p. 49. *Welch v. Hassett* (1937), 90 F. (2d) 833, 837 (1st CCA). *National Surety Co. v. Ulmen* (1934), 68 F. (2d) 330, 332 (9th CCA).)

PLAINTIFF'S ASSIGNMENT No. I

If defendant intends (brief p. 8) a confession of error in excluding competent evidence, we accept the confession and the results to follow. Those results are not what defendant seems to think. Reversal as to one cause of action does not necessarily reverse the entire case. The Appellate Court may reverse as to one cause

and affirm as to others. We repeat, there are four separate causes of action in one complaint, upon three of which plaintiff prevailed; on one defendant prevailed (plaintiff's opening brief, pp. 5-6). An appeal is only from the adverse part of a decision, and retrial may be limited accordingly. (*Santa Marina Co. v. Canadian Bank of Commerce* (1918), 254 Fed. 391, 397 (9th CCA), (certiorari denied 250 U.S. 643, 63 L. ed. 1186). *May Department Stores Co. v. Bell* (1932), 61 F. (2d), 830, 842 (8th CCA). *Gasoline Products Co. v. Champlin Refining Co.* (1931), 283 U.S. 494, 75 L. ed. 1188, 1191. *Twenty-one Mining Co. v. Original Sixteen to One Mine* (1920), 265 F. 469, 471 (9th CCA).)

The one case cited by defendant (*Empire Fuel Co. v. Lyons* (1919), 257 Fed. 890, 898 (6th CCA)) did not involve separate claims separately treated by the court. The complaint charged one breach of a contract. The court held that it could remand a case for new trial on a particular branch of a controversy, but could not, on the record before it, increase the damages in that case. It is not authority for a situation such as is presented in the case at bar.

(2) The trial court did formally reject as representations of amount and character of work the testimony of representations upon which bids were submitted. Defendant's labored argument to overcome the court's certificate was presented to the trial court. Defendants then formally asserted that the court had not ruled as stated, and moved to strike from plaintiff's bill of exceptions the question of rejection of evidence. The trial court then stated that the bill of exceptions correctly reflected his ruling on this evidence. He has so certified to this court (R. 344). We assume this certificate imports verity.

Defendant's argument that the findings foreclose plaintiff's attack on the rejection of this evidence, is, we submit, without merit. These findings were made *with the evidence of representations excluded.* That evidence was material to plaintiff's first and second causes of action. Without it, all showing of change of work and delay were cast aside by the court.

No argument is offered in support of the court's ruling with respect of this evidence of representations. We accept the implied admission the rejection was error. The court's certificate to plaintiff's bill of exceptions nullifies defendant's attempt to avoid the issue.

Defendant asks what plaintiff expects this court to do. Plaintiff expects this court to find the rejected evidence is material and competent: that its rejection was error and prevented a fair trial of plaintiff's first cause of action, and to order the case remanded for re-trial of the first cause with the rejected evidence received and considered.

PLAINTIFF'S ASSIGNMENT No. II

This assignment of error deals with the second cause of action—the commercial haul. The court's findings as to money involved in this cause covers separate periods of time (1) the haul to September 1, 1927, (2) the haul to October 25, 1927, (3) the haul to December 31, 1927, and finds the amount due for any one of the periods (R. 169). If other facts are sufficiently found to show plaintiff's right to recover beyond September 1, this court has the right to enter the appropriate judgment on this cause of action. Otherwise, this court may remand the case for re-trial of the right to recover beyond September 1, and to ascertain to what further date the right to conduct the log haul existed. Two qustions covered by the findings (plaintiff's right to

conduct the log haul, and the net amount due for each of the separate periods of time) need not be re-tried in the event the case is reversed on this appeal without entering a final judgment on the second cause of action in this court.

The federal courts are committed to the practice of sending cases back for limited re-trial, a practice clearly in furtherance of justice. (*Gasoline Products Co. v. Champlin Refining Co.* (1931), 283 U.S. 494, 75 L. ed. 1188, 1191. *May Department Stores Co. v. Bell* (1932), 61 F. (2d) 830, 842 (8th CCA). *Twenty-one Mining Co. v. Original Sixteen to One Mine* (1920), 265 Fed. 469, 471 (9th CCA).) Many authorities are cited in *May Department Stores Co. v. Bell, supra.* From it we quote (second column, p. 842):

"The issues are separate and distinct. It seems unjust that the plaintiff should be required to retry the issue of liability because of an erroneous instruction as to an item of damages. The finding of the jury should have put the question of liability at rest.

"At common law, a separation of issues and the remanding of a single issue was not allowed. Some courts still hold that it is not permissible. *Krummen Motor Bus & Taxi Co. v. Mechanics' Lumber Co.,* 175 Ark. 750, 300 S.W. 389; *McKeon v. Central Stamping Co.,* 264 F. 385 (C.C.A. 3).

"The Supreme Court, however, has held that a new trial may be granted, restricted to the issue of damages. The question first arose in *Norfolk Southern R. Co. v. Ferebee,* 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303, where such separation was hesitatingly allowed; and again appeared in *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U.S. 494, 51

S. Ct. 513, 75 L. Ed. 1188. In the latter case it was contended that the granting of a new trial upon a single issue violated the Seventh Amendment. The court said (page 497 of 283 U.S., 51 S. Ct. 513, 514): 'It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all. This continued to be the rule in some states after the adoption of the Constitution; but in many it has not been followed, notwithstanding the presence in their Constitutions of provisions preserving trial by jury.'

"And, on page 499 of 283 U.S., 51 S. Ct. 513, 515: 'Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again. As the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed. But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried.'"

We think the primary record is sufficient for this court to conclude plaintiff is entitled to recover the stipulated price for the log haul to October 25. The contract gave defendant the right to terminate the contract under given circumstances, but no right to take any part of the work away from plaintiff. (Plaintiff's answering brief, pp. 21, 29-31.) The contract is not separable. The log haul as an incident of the entire contract was of importance to plaintiff's bid. So long as plaintiff continued to construct the railroad

it had a right as an inseparable part of its contract to conduct the commercial haul.

The court found that on October 7, 1927, *after the completion date named in the contract,* defendant ordered plaintiff to continue work constructing the railroad. Can a finding that plaintiff "was not permitted to continue" the log haul defeat plaintiff's right? Plaintiff was not "permitted" to conduct the log haul after July 17, 1927. That is the basis for the second cause of action. The affirmative finding that plaintiff had the right to conduct the commercial haul while constructing the railroad (R. 164), and that plaintiff's contract was continued after September 1 on order of defendant, presents the legal question of plaintiff's right to conduct the log haul during such continuance. Piecemeal taking of the road in bad faith to get the log haul (R. 168) precluded the "permission" argument. The portion of the road so taken October 12, 1927, was then, after the named completion date, in possession of plaintiff working under orders of defendant. We submit this court has the findings necessary for appropriate judgment.

Thus far we have discussed this assignment on the primary record. In plaintiff's bill is an exception (with stated reasons) to finding XVI (R. 320) on the subject of "permission." There is an exception to finding XVIII (with stated reasons) insofar as it limits the commercial haul recovery to logs hauled prior to September 1, 1927 (R. 322). Plaintiff duly requested a finding of delay caused by defendant (R. 316).

We submit the court erred in construing the pleadings as not claiming extension of time. The averments of the complaint are analyzed on our opening brief at pages 20-22. We think the complaint clearly pleads an extension of time to build the railroad, and that such extension covered every activity provided in

the contract. The court not only construed the pleadings (erroneously, we think) in his findings, but in his opinion clearly ruled that the *issue* of extension of time was not presented. (R. 339.) Defendant's effort to confine the claim of extension to construction work only, is, we think, without merit. It is grounded on the theory that the contract is separable, and assumes the right of defendant to make changes of work of any magnitude. The reserved right to change work is confined to incidental and not material changes (Plaintiff's opening brief, p. 14). Changes of magnitude are pleaded in plaintiff's complaint and averred as cause for extending the "time of completion *of said railroad*" (R. 20). The italicized words of the complaint are omitted from all quotations on defendant's brief. We deem them important as inconsistent with defendant's contention that the pleaded extension applied only to construction.

Defendant argues that the court's finding against representations at bidding, and therefore against change in work, makes moot the ruling that extension of time was not pleaded. This is a *non sequitur*. Findings, after erroneously excluding evidence that would result in different findings, if admitted, can hardly control construction of pleadings.

On this second cause we submit:

(1) On the primary record this court may enter judgment for the amount due plaintiff up to October 25, 1927, when the entire road was taken by defendant; that the contract is not separable; that the order given after September 1 to continue the contract is a definite extension of time; that the finding that plaintiff's contract entitled it to conduct the log haul while the road was under construction, and the finding of the amount due to October 25, complete the findings on

every issue necessary to entry of judgment in the appellate court. (2) If this conclusion cannot be drawn from the primary record, then we submit the court erroneously construed the pleadings; that the complaint does present the issue of extension of time, and the case should be remanded as to this cause of action for the limited purpose of trying the issue of extension of time.

PLAINTIFF'S ASSIGNMENT No. IV

We adhere to the order adopted on our opening brief, discussing assignment IV before assignment III. Defendant's discussion of IV is at page 42 of its answering brief.

Plaintiff repeatedly on opening brief stated its contention that the cause of action on the material haul was a simple claim for money not paid when due (Opening Brief, pp. 6, 7, 25, 27, 28). Defendant concedes plaintiff had this choice, but asserts it did not elect to sue for money due because (1) the lower court did not so consider it, and (2) propinquity. The failure of the lower court to allow interest *because* he declined to recognize the difference betwen the first and third causes of action resulted in appeal on this branch of the case. Stating a cause for damages for change of work and a cause for money due for specified work in one complaint, does not divest either of its true classification. Defendant does not attempt to answer this proposition covered in our opening brief at p. 27. It is elementary. The reply rests on the bare assertion of defendant, citing as authority the opinion of the lower court pursuant to which the judgment was rendered from which plaintiff is appealing. At risk of being tedious, we refer to the complaint. The three items covering material haul are alike in form, separately stated. The first averment is the provision of the con-

tract for hauling timber at a stipulated price (Par. XXII, R. 21). The second averment is the footage hauled for which at the contract price a stated sum should have been paid; that defendant has paid only part of the contract amount "leaving a balance due and owing plaintiff from defendant on this item of Thirty-five thousand one hundred twenty-one and 30/100 ($35,121.30) dollars, no part of which sum has ever been paid, although frequently demanded." (Par. XXIII, R. 21.) If these averments stood in a separate pleading as the gravamen of complaint, it would classify as an action to recover money due under contract. It is not changed by being in a complaint with other causes (*1 Bancroft Code, Pl.*, sec. 116, p. 224). So treated, the right to interest on the unpaid money from due date is clear.

The cases cited by defendant (B. p. 45) confirm our position as to the law in Oregon. Two of them (*Duncan Lumber Co. v. Willapa Lumber Co.* (1919), 93 Or. 386; 182 Pac. 172; 183 Pac. 476, and *Propst v. William Hanley Co.* (1919), 94 Or. 397; 185 Pac. 766) rest upon the authority of *Sargent v. American Bank and Trust Co.* (1916), 80 Or. 16; 154 Pac. 759; 156 Pac. 431, based on Oregon's interest code before the amendment of 1917. The Sargent case was expressly destroyed as authority by later decisions (Plaintiff's opening brief, p. 29). Neither of the cited cases involved a definite sum due by contract on a definite date. The Duncan case was an action to recover damages for refusal to deliver lumber, the market price of which had appreciated. The market price was to be ascertained. The only definite figure was the contract price, which became the offsetting amount. The Propst case was for damages for failure to deliver hay. Many controvesies, such as the cost of cutting, stacking, sale of hay to other parties, modifications of contract, refusal of

plaintiff to perform, etc., had to be determined. Both were typical damage actions.

The third case (*Obermeier v. Mortgage Co. Holland-America* (1927), 123 Or. 469; 259 Pac. 1064; 260 Pac. 1099; 262 Pac. 261) is far beside the mark. It was the third appeal, and refers to the earlier decisions for a statement of the case. These clearly mark it as an action for unliquidated damages without due date. The first appeal (98 Or. 195; 192 Pac. 283; 193 Pac. 915) states (98 Or. 197) that it is "an action for damages for breach of the covenants contained in a lease of real estate." The second appeal (111 Or. 14; 224 Pac. 1089) shows that the lease was made November 28, 1917 (111 Or., p. 16), that possession was not delivered and between January 24 and February 23, 1918, the lessee sued "claiming that he had been deprived of the privilege of obtaining possession of and preparing the land for cultivation" (111 Or., p. 18). The cases on plaintiff's opening brief (pp. 29-31) state the law in Oregon applicable to interest on definite sums not paid when due.

On plaintiff's opening brief (p. 29) the decision of this court in *New York Alaska Gold Dredging Co. v. Walbridge* (1930), 38 F. (2d) 199, 204 (9th CCA) was cited as being for money due under a service contract. We were discussing denial of interest on the *material haul* award. Defendant credits the reference to plaintiff's discussion of the *commercial haul* (B., p. 40). As to the material haul interest claim, it is clear authority. The principle can not be swept aside by calling it an employment contract. In the case at bar plaintiff contracted to haul bridge materials at a stipulated sum due on a given date. This court clearly stated the rule (38 F. (2d) 205) "Interest is generally recognized as the compensation awarded by law for the detention of money after it is due." By contract

this material haul money was due February 1, 1928, at the latest. We think this case authority for allowing interest on the commercial haul, also.

PLAINTIFF'S ASSIGNMENT No. III

Allowance of interest is a legal question. An appropriate declaration of law was requested (R. 318). The court not only refused the declaration, but in finding the amount due failed to include interest, to which failure a specific exception was reserved (R. 321-322). The assignment fully informs the court (R. 383). We don't understand the rules of the court to require more.

Defendant's suggestion that there was a conflict of evidence re amount of log haul (B., p. 33) is without merit. It is a continuation of the unsound argument that the haul would not have been accepted if plaintiff was to conduct it. The contract covered *all* hauling conducted over the road until it was completed. The hauling was conducted over the road. The amount was never in dispute. The contention of defendant was legal, not factual. (Plaintiff's answering brief, pp. 27-28.)

Allowance of interest was definitely excluded by the court: "The court therefore feels that under the Oregon statute, it is not bound to allow interest from the date of final estimate." (R. 342.) The question is whether interest should be allowed.

Defendant says this cause is an action for damages, and therefore can't carry interest. Plaintiff is claiming the stipulated price for all carloads of commercial freight that passed over the road before it was completed, claiming that under its contract this compensation should have been included in the final estimate (Par. XXI, R. 20-21). If the facts pleaded by plaintiff are sufficient to sustain a recovery on more than one

theory, no motion having been interposed to require a separation or election, plaintiff may recover on any theory presented by the complaint. (*Goodwin v. Rowe* (1913), 67 Or. 1, 10; 135 Pac. 171, 174. *Kaller v. Spady* (1933), 144 Or. 206, 216; 24 Pac. (2d) 351, 354-355.)

Interest is allowable in Oregon for breach of contract to *pay money* at a definite date. The court found the commercial haul a part of plaintiff's contract. Defendant says the log haul money is not due plaintiff because defendant had someone else haul the logs (B., pp. 32-37). Plaintiff's right to have the log haul money included in final estimate cannot be defeated by this action of defendant. This was part of plaintiff's contract. Defendant took the haul at the peril of paying plaintiff the contract price. Defendant asserts this *must* be an action for damages (not damages in the sense of money due on final estimate) *because* plaintiff did not haul the logs. That is, plaintiff's right can be defeated by defendant's wrong, and *because* defendant wronged plaintiff the latter cannot recover as of the contract due date. No authority is cited for this proposition.

The New York courts, under similar circumstances, upheld the right to have included in final estimate the agreed price for work wrongfully taken from a contractor, even though the contractor did not perform the work. We find no contrary decision.

Gallagher v. Hirsh (1899), 61 N.Y.S. 609; 45 App. Div. 467.

This case covers the exact situation. The complaint as finally presented contained two causes of action (the first and third pleaded). The first cause was for damages caused by misrepresentation at bidding (top p. 610). The third cause, like the log haul in the case at bar, was for an amount the architect refused to in-

clude in final estimate, the claimed amount consisting of the contract price for work *which defendant took from plaintiff and gave to another*, plus a small claim for extras. (Bottom p. 610.) Defendant denied that the claimed payment had matured, or was due and owing to the plaintiff (bottom p. 611). The fact was that before plaintiff had completed certain work, it became necessary to make additional soil excavation (bottom p. 612), which work was let to Sooysmith & Co. "In doing this additional work of excavation, etc., Sooysmith & Co. necessarily performed part of the work originally included under the plaintiff's contract, viz., part of the plaintiff's excavations, and a part of the shoring and underpinning of Chickering Hall, which was next to the lot in question. It is claimed upon the part of the defendant that the reasonable value of this omitted work should be deducted from the amount due to the plaintiff, and the plaintiff claimed that there should be no deduction * * * because the defendant had no right to take the contract away from plaintiff, and give it to Sooysmith & Co." (middle p. 613). The court held that there could be a recovery as for money due on final estimate (Plaintiff's answering brief, p. 31). The trial court, in measuring recovery, failed to require deduction of the cost of doing the work, and for that reason alone the case was reversed. Interest was allowed as for money not paid when due (p. 614).

We think it immaterial whether the recovery be called damages or something else. It is for money covering work which plaintiff contracted to do, and for which it was entitled to be paid on the contract due date. In the State of Oregon interest accrues on money after it is due. The recent cases are collated in plaintiff's opening brief at pp. 28-32. The cases cited by defendant are discussed in this brief at pp. 10-11. When

the facts in each of these cases cited by defendant are considered, each lacks the requisites of definite due date, and amount certain or ascertainable by calculation.

We submit plaintiff's claim for the log haul is a claim for money due at final estimate, and it was error to deny interest from the due date.

Respectfully submitted,

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No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon

REPLY BRIEF OF APPELLANT

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No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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REPLY BRIEF OF APPELLANT

This appeal challenges the correctness of rulings of the District Court with respect to the second and third claims of the complaint. Both charge breach of contract. Whether or not there was the breach claimed turned altogether upon the interpretation to be given the contract. The District Court accepted plaintiff's theory of the contract and denied defendant's motion

for rulings interpreting the contract against plaintiff's contentions.

Plaintiff's discussion, in its answering brief as appellee, of these two questions of contract interpretation is addressed for the most part to the specific points made in appellant's opening brief. As to these points, appellant's position has been fully stated and need not be repeated here. Before undertaking such reply as may be necessary, we first proceed to answer the argument that the record here is inadequate to present the questions sought to be reviewed.

I

THE PROCEDURAL QUESTION

Defendant's Assignments of Error present only questions of contract interpretation which were submitted to and ruled upon by the District Court.

Defendant's appeal asks this Court to review rulings of the District Court upon questions of contract interpretation which were submitted to the District Court during the trial by an appropriate motion. Plaintiff is in error in its assumption that any question of the sufficiency of the evidence to sustain findings is involved. Except for one finding not of importance here (see Appellant's Opening Brief, p. 15), defendant has no criticism whatsoever of the findings upon any question of fact involved. Defendant's griev-

ance is that the conclusions of law and the judgment entered thereon are erroneous, not because of lack of evidence to sustain any finding of fact, but because the District Court misinterpreted the contract between the parties.

Plaintiff's complaint alleged (1) that the contract gave it the right to handle the log traffic which was moved over a part of the new road between certain dates, and that defendant's refusal to permit this was a breach of contract, and (2) that the contract made certain prices applicable to the hauling of all bridge material, and that defendant's refusal to pay these prices was a breach of contract (R. pp. 18-23). Defendant's answer denied that the contract gave plaintiff the rights claimed, and alleged that what defendant had done, both with respect to the log traffic and the bridge material haul, was within its rights under the contract (R. pp. 35-42).

The questions thus presented by the pleadings, whether there were the breaches of contract claimed, were issues of law turning solely upon the interpretation to be given the contract. The facts were not in dispute; defendant had refused to permit plaintiff to handle the log traffic, and had refused to pay the prices claimed to be applicable to the bridge material haul. If plaintiff's theory of the contract was correct,

it was necessary only to determine the amount of the recovery. If, on the other hand, defendant's interpretation of the contract were accepted, there could be no recovery upon either of the two claims.

At the trial and before final submission of the case, defendant moved the Court to adopt conclusions of law declaring (1) that the contract did not give plaintiff the right claimed to conduct transportation operations, and that defendant had acted within its legal rights under the contract in taking possession of the railroad and in conducting operations thereon, and that plaintiff's rights as contractor did not extend to the hauling of log traffic accepted for transportation by defendant after it had taken possession of its line, and that defendant, in taking over the railroad and conducting log transportation thereon, did not breach its contract with plaintiff (R. pp. 179, 182-184), and (2) that plaintiff was not entitled, under the terms of the contract, to any additional payment for hauling bridge materials, and that the contract, correctly interpreted, entitled plaintiff to payment at the rate at which payment had theretofore been made, and also that the decision of the Chief Engineer against plaintiff's contention, made during the progress of the work, was binding and conclusive (R. pp. 251, 253-254).

Defendant's motion for the adoption of these conclusions of law was taken under advisement by the District Court and later denied. A specific exception was taken to the rejection of each of the conclusions requested (R. pp. 182-184, 253-255). And defendant likewise specifically excepted to each of the rulings of the District Court which interpreted the contract according to plaintiff's contentions (R. pp. 189-191, 256-258). Each of these exceptions was directed specifically toward the particular ruling challenged. Their sufficiency for the purpose intended is not open to question under the rule of the cases cited by plaintiff, which deal with general exceptions to findings upon fact issues.

Thus defendant preserved these questions of contract interpretation in the two ways which have many times been approved by the Supreme Court and by the Circuit Courts of Appeal: (1) The propositions of law were presented to the Court during the progress of the trial, and rulings obtained upon them, to which rulings specific exceptions were taken, and (2) specific exceptions were taken to the rulings upon these questions in the special findings and conclusions of law adopted by the trial court.

Ever since the warning of Judge Taft in *Humphreys v. Third National Bank*, 75 Fed. 852, 855,

that the rule applicable to the review of findings upon fact issues was a "very technical and severe" one which regrettably had "proved a trap to counsel" (p. 856), the courts have been careful to point out that questions of law are reviewable if the questions had been submitted to and ruled upon by the trial court, or if they were separately stated in the findings and conclusions adopted and specific exceptions thereto had been taken.

Fleischmann Co. v. United States, 270 U. S. 349, 46 S. Ct. 284;

Arthur C. Harvey Co. v. John F. Malley et al., 288 U. S. 415, 53 S. Ct. 426.

In the *Fleischmann* case (270 U. S. 349, 356) the Supreme Court said:

> " . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. *Norris v. Jackson,* supra, 129; *Martinton v. Fairbanks,* supra, 673. That is, as was said in *Humphreys v. Third National Bank,* supra, 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by

> the court from the facts found he should have them separately stated and excepted to.' "

Defendant here took both of the steps presented. The propositions of law were presented to the Court during the trial, and at its conclusion exceptions were taken to the particular conclusions of law which decided the questions of contract interpretation involved. And the petition for appeal was supported by assignments of error which challenged the rulings of law upon the questions so presented. We refer particularly to Assignments VII (R. p. 354), XI, XII, XIII, XIV (R. pp. 357-360), XX (R. pp. 363-364), XXIII, XXIV and XXV (R. pp. 365-367).

Plaintiff's brief ignores these Assignments, and refers only to others which are directed to matters in the findings; and upon the assumption that the questions of contract interpretation were issues of fact, disposed of by the findings, it is said that the sufficiency of the evidence to support the findings is not open to inquiry here (Answering Brief of Appellee, pp. 3-11).

We have already pointed out that nowhere in the special findings did the trial court undertake to pass upon any issue of fact whatsoever pertaining to the construction to be given the contract upon the ques-

tions here involved (R. pp. 159-172). Indeed, it was made clear in the oral opinion that because the contract provision as to the commercial haul was considered unambiguous, the Court rejected as incompetent testimony the very evidence which plaintiff now says (impliedly at least) is available to support a finding of fact upon this question of contract interpretation (R. p. 336, Answering Brief of Appellee, pp. 3-4).

Some of defendant's assignments were directed to matters in the special findings to which exceptions had been taken. This seemed necessary in order to reach rulings of law appearing in the findings. Finding XV had the following statement (R. pp. 164, 168):

> "The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant . . . The log haul was commercial business. To do it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same."

Defendant excepted to these rulings in the finding as follows (R. pp. 189-190):

> "To the conclusion and decision of the Court stated in Finding of Fact No. XV to the effect that the contract between the parties gave plaintiff the right to conduct commercial haul while the line was under construction, and was breached by defendant in the manner stated in said finding of fact; and to the conclusion stated

> in said finding of fact that plaintiff was entitled to conduct log transportation for Clearwater Timber Company as commercial business."

Similarly, Finding XIX, on the subject of the Bridge Material Haul, stated the Court's interpretation of the contract and the conclusion that defendant's refusal to pay at the rates held applicable was a breach of contract (R. p. 255). To these rulings defendant excepted as follows (R. p. 256):

> "To the conclusion of the Court as stated in Finding of Fact No. XIX that the stipulations of the contract between the parties fixing specified prices for hauling piles, timber, and metal fastenings were breached by defendant, and to the conclusion as stated in said finding of fact that said materials were not commercial haul to be paid for at the contract prices for hauling commercial freight."

Defendant had no control over the form of the findings entered. They were prepared and submitted by plaintiff. Their adoption by the Court, with these conclusions of law included, cannot operate to change questions of interpretation of a written contract into issues of fact or to deprive defendant of its right to have the Court's rulings upon them reviewed here.

The case was not free from procedural difficulties, due to the inclusion in one cause of action of four widely dissimilar claims. The first involved many

issues of fact to which almost twenty-two hundred pages of testimony were directed in the preliminary hearing before the Auditor. The last claim was conceded, the amount of recovery having been agreed upon at the preliminary hearing. The question of liability upon the two remaining claims (those involved in this appeal) turned upon the interpretation to be given the contract.

In this situation requests for declarations of law as to the meaning of the contract, and exceptions to the particular rulings and conclusions of law in which the Court's interpretation of the contract was stated, seemed the appropriate if not the only method of bringing the questions directly and specifically to the attention of the trial court. The pleadings stated the opposing contentions of the parties as to their contract rights, both as to the transportation of commercial traffic and the bridge material haul. The resulting issues of law were specifically considered and passed upon. Nothing further could have been done by defendant to give the trial court any greater opportunity to correct the rulings upon these issues which defendant considers erroneous. Defendant is therefore entitled to have the errors corrected in this Court.

II

COMMERCIAL HAUL CLAIM

1. The contract and its specifications, read together, obligated plaintiff to include in its work trains such cars of commercial traffic as defendant might accept for transportation during completion of the construction work. The contract did not obligate defendant to accept any such traffic nor to use plaintiff's facilities for handling any traffic other than cars accepted for transportation while the construction work continued.

We have indeed failed to make our position clear if (as stated at page 12 of appellee's brief) our opening brief can be read as contending that the contract rights and obligations as to the commercial haul are to be determined without reference to the specifications attached to the contract. Just the opposite appears from our analysis of the contract proper and the specifications (Brief of Appellant, pp. 23-30).

It is the office and function of the specifications of a building contract to explain and make definite the work which is described in general terms in the contract. 4 Elliott on Contracts, Sec. 3620. Here the work was generally described as "clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named" (R. p. 52). Operation of trains handling commercial traffic, after completion of tracklay-

ing, was not provided for. But the "other work" which the contractor might be called upon to do included what was referred to in one of the price items as "Handling, . . . all commercial business . . . " (R. p. 63).

The specifications explain and limit this obligation. After tracklaying and during the finishing work, the contractor was required to furnish some, but not all, of the work train service needed; and *in its work trains*, the contractor was obligated to haul, at a price of $1 per car mile, cars of commercial traffic accepted for transportation by the Railway Company (R. pp. 122-123).

The meaning of the contract and specifications, read together, is perfectly clear. Plaintiff obligated itself to build a branch line of railroad but undertook no obligation to conduct operations upon it, other than the operation of some of the work trains required in track completion work. And in this work train operation, and while the track work continued, plaintiff undertook to handle commercial cars whenever defendant desired to have any such cars moved.

The construction of the contract advocated by plaintiff would read into the contract, first, an obligation upon defendant to accept for transportation before completion of the road, an undetermined amount

of commercial traffic and to continue plaintiff in possession of the line after the track work was sufficiently completed for defendant's purposes, in order to permit plaintiff to operate the freight trains required for such traffic, and second, an obligation upon plaintiff to operate such freight trains up to a fixed date, regardless of the status of its construction work.

We submit that the result of any such additions is a distortion of the contract.

2. The contract provision, if construed as contended for by plaintiff, would be unenforceable for lack of mutuality.

Despite direct evidence to the contrary (and the absence of any special finding on the subject), plaintiff says that there is evidence in the record from which it could be inferred that defendant made a commitment, or at least that there was a moral obligation, to Clearwater Timber Company to transport logs for it while the railroad was being built (Brief of Appellee, pp. 26-27); and it is argued that when plaintiff and defendant made their contract in 1925 they had in mind as "commercial business" the log traffic of the Clearwater Company. Plaintiff attempts thus to liken the contract provision for handling "all commercial business" (Price Item 72, R. p. 63) to contract obligations for the sale of the entire output of a producer

or for the purchase of a season's supply of material, which of course do not lack mutuality.

There is a complete answer to this in the letter from defendant to plaintiff dated August 5, 1926, which shows that the question of handling logs before completion of construction was still unsettled at that time; the Clearwater Timber Company was then asking for definite assurances that the transportation service would be provided, beginning on June 1, 1927 (R. pp. 210-211). Commercial log traffic during construction was not in contemplation when the parties contracted in 1925. This is made additionally clear by the specifications which explained what was meant by handling commercial business. The contractor was required to handle any such cars "with his own work train" (R. p. 123).

It is therefore clear that the parties did not contract for the handling of the output or requirements of an established plant or business for a limited period, as in the cases relied on by plaintiff. They contracted merely for the handling, in work trains in operation during construction, of such cars as defendant chose to accept for transportation. This was an incident of the construction work contracted for, and the obligation was enforceable only as such. If interpreted as an independent undertaking for conducting

transportation service, it would be void for want of mutuality. See *Imperial Refining Co. v. Kanotex Refining Co.*, 29 Fed. (2d) 193, in which the court (at page 195) said:

> "When the quantity of a commodity to be delivered or received under a contract of sale rests in the uncontrolled will or desire of one of the parties, mutuality is lacking."

As to the contention that plaintiff had the log haul in mind when submitting its bid for the construction of the line (Brief of Appellee, p. 16), it is only necessary to add that if plaintiff did attempt to outmaneuver defendant and the other bidders for the work by putting in an unbalanced bid, expecting to offset a reduction in its solid rock price with log haul profits (evidence of this was rejected by the trial court, R. p. 336), its expectation was not made the subject of a commitment in the contract. What was said by the Supreme Court in *Maryland v. Railroad Company*, 22 Wall. 105, 112, is much in point:

> "There is a well recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow."

3. The contract reserved to defendant the right to stop any part of the work at any time.

Plaintiff's argument upon this point is that the "stop work" clause could not be resorted to by defendant to stop a part of the work contracted for, if defendant proposed thereafter to do the part of the work thus stopped itself.

But the language used in this provision of the contract suggests no such limitation upon the right reserved. If hauling commercial log trains was part of the work contracted for, which of course it was not, and if defendant found that it could conduct the operation better through its own forces, the contract clearly permitted the change; and if this affected the contractor disadvantageously, he had his remedy in an offsetting increase in the unit prices for the work remaining under the provisions of the final paragraph of the contract (R. p. 72).

None of the cases cited by plaintiff offers any reason why the contract here involved should not be enforced as written. Whatever may be said of contracts which provide merely for discontinuing work, with no provision for compensating the contractor for any resulting disadvantage, a right clearly reserved to

stop any part of the work contracted for, with a provision for the protection of the contractor, applicable to changes or reductions in the work, means what it says, and the owner cannot be accused of bad faith when he takes advantage of it, whatever his reasons or purposes may be.

III

BRIDGE MATERIAL CLAIM

1. Price Item 72 of the contract specifying a price for handling material of the Railway Company, and not the price items for hauling materials to bridge sites, was applicable to rail transportation of bridge materials.

Plaintiff reads Price Item 72 of the contract as applicable only to the transportation of commercial business, which would not include bridge materials belonging to defendant (Brief of Appellee, pp. 35-38). This price item reads as follows (R. pp. 63-64):

> "Handling, . . . all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, . . . "

We understand plaintiff's contention to be that the words "used in commercial service . . . " in this sentence qualify both the words "empty cars" and "material," so that the only "material" covered by the price

item would be that used in commercial service or the service of other contractors. There is no comma following the word "material," hence the construction advocated is a possible one.

But plaintiff relies too much upon punctuation, which is "a most fallible standard by which to interpret a writing." *Ewing's Lessee v. Burnet*, 11 Peters 41, 54; 9 L. Ed. 624. The construction of a written contract is determined by the words used, in their relation to each other, and not by the punctuation. *Holmes v. Phoenix Ins. Co.*, 98 Fed. 240.

The term "material" in Price Item 72 would have little if any significance or effect if limited as claimed by plaintiff. It is difficult to see what occasion there would be for the transportation of material used in the service of transporting commercial traffic. We think it clear that Item 72 was intended to provide a price for rail transportation of materials of all kinds, including such material for bridge construction as could be brought to the bridge sites by rail.

2. Parties to a construction contract may stipulate for the submission of questions of contract interpretation to an engineer or architect of the owner.

We challenge plaintiff's assertion that questions of contract interpretation may not be submitted to and

passed upon by an engineer or architect. Such questions are indeed questions of law, as plaintiff here contends (Brief of Appellee, p. 40), contrary to its argument upon the procedural point, where they are treated as issues of fact (pp. 3-5). But whatever their classification may be, it cannot be doubted that in Federal courts at least, any and all questions arising in the performance of the work may be submitted to and finally decided by the engineer or architect. *Memphis Trust Co. et al. v. Brown-Ketchum Iron Works,* 166 Fed. 398. Decisions to this effect cannot be brushed aside upon the theory that they involved "questions of fact of a technical nature properly left to a technical man." See, for example, *Merrill-Ruckgaber Co. v. U. S.,* 241 U. S. 387, where the architect determined the meaning to be given the word "building," and *Smith v. Copiah County,* 239 Fed. 425, in which the engineer's decision as to the meaning of the term "overhaul" was held final and conclusive. *Haskell v. McClintic-Marshall Co.,* 289 Fed. 405 and *McCullough v. Clinch-Mitchell Const. Co.,* 71 Fed. (2d) 17, which hold that broad waivers of all rights to sue are not enforceable, announce no different rule; in the latter of these two cases the arbitration clause was given full effect.

The contract stipulation here involved gave defendant's engineer power to determine which of two possibly conflicting price items applied to the railroad haul of bridge materials. His decision upon this question is not open to review here.

Respectfully submitted,

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No. 8594

United States Circuit Court of Appeals

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NORTHERN PACIFIC RAILWAY COMPANY, a corporation
Appellant and cross-appellee,
v.
TWOHY BROTHERS COMPANY, a corporation
Appellee and cross-appellant.

Upon Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes appellant and petitions this Honorable Court for a rehearing of this cause upon the following grounds:

1. The decision of this Court upon the breach of contract claim (the commercial haul claim) is erroneous in that it misconstrues the contract between the parties, first, by assuming that the contract gave appellee, Twohy Brothers Company, the right to haul

commercial traffic over appellant's railroad for a stated period and without regard to the completion of construction work thereon, and second, having assumed the existence of such right, in holding and deciding that the contract provisions for stopping work and for changing the work did not permit appellant to terminate any such right.

2. The decision of this court directing the addition of interest to the award of $125,000 as damages for breach of contract is erroneous in that it undertakes to increase the damages fixed by the trier of fact as full compensation to the injured party, *up to the time of judgment*, and misinterprets and misapplies the decisions of the Supreme Court of the State of Oregon upon a local question, viz., the meaning of the Oregon interest statute (Section 57-1201, Oregon Code Annotated).

1.

(a) EXTENT OF COMMERCIAL HAUL CONTRACTED FOR

The first question presented by the record submitted to this Court was whether the contract between the parties gave appellee the exclusive right to haul logs for appellant as "commercial haul" for a stated period, or whether the contract right was limited to

the handling of any cars accepted for transportation while appellee was engaged in construction work and was operating work trains.

The decision of this Court dismisses this question with the assertion that the contract called for both construction work and non-construction work, the latter to include commercial haulage, and the two classes of work to be "mutually exclusive in function"; and the decision seems merely to assume that the contract obligation to complete grading, bridging, etc., by June 1, 1927, "and all work *on or before* September 1, 1927" (R. p. 52), compelled the continuance of work until the latter date and correspondingly entitled the contractor to continue commercial hauling up to that date.

This is contrary to the plain intent of the contract. At most, the commercial haul mentioned in the price items (in the contract proper, R. pp. 63-64) and described in the Tracklaying and Surfacing Specifications (R. p. 123) comprehended merely such cars of commercial traffic as the Railway Company might decide to accept for transportation while the construction of the line was in progress and while the contractor was operating work trains. We understand it to be conceded that the Railway Company was

under no obligation to accept a single car of commercial traffic for transportation by the contractor.

The contract required the contractor to complete all work *on or before* September 1, 1927 (R. p. 52). There was no specified "commercial haulage" to be brought to a conclusion at this time. How can this time limit upon the contractor's construction work be construed as a commitment entitling the contractor to continue non-construction or incidental service to the end of the period allowed? If by careful planning the contractor succeeded in finishing all construction work *before* September 1, 1927 (and the obligation to do this, if possible, seems plain), is there anything anywhere in the contract that would justify retention of the line, until September 1, 1927, for the purpose of non-construction activities, such as commercial haulage?

This Court's decision imports such a provision into the contract. With no obligation to provide a single car of commercial traffic for hauling by the contractor, and with the contractor's right limited to the handling of such cars as were accepted for transportation while the contractor was at work on the construction of the line, up to some date *not later* than September 1, 1927, this Court proposes to accord the contractor the exclusive right to handle commercial traffic accepted

for transportation by the Railway Company *after the construction work had ended* and until the expiration of the period allowed for the construction work.

This is plainly a distortion of the contract. When the construction work ended on the first 29 miles of the road, the right to handle commercial cars thereon likewise ended. We repeat that the provision fixing a date *on or before* which the construction work must end cannot be read as entitling the contractor to continue non-construction work after the construction work had ended.

The construction work on the first 29 miles of the road was terminated at the direction of the Railway Company. Its purpose was to begin the log transportation service for which the road was built. This does not mean that the contractor was deprived of any construction work for which it might have been paid. The track work was paid for in full, and the contractor would have received nothing more if it had done all of the track finishing work that might have been required of it under the contract.

What the Railway Company did was to accept the track finishing work which had been done up to June 15, 1927 (on the first 29 miles of the road) as sufficiently complete for its purposes, paying the contractor the full contract price therefor. The Railway Com-

pany's right to do this could not ordinarily be disputed. It is questioned here only because the termination of construction work by the contractor also brought to an end the transportation of commercial freight in the construction work trains.

But there is nothing whatsoever in the contract even to suggest that the construction work must be continued to the limit of the time allowed for its completion, *in order to permit* continued commercial haul by the contractor. Such a contention rests upon the assumption that there was an implied obligation to leave the contractor in possession of the line until completion of everything that the Railway Company could possibly require of the contractor for the per mile price paid for the track work, so that the contractor might enjoy the commercial haul privilege as long as possible. The contract cannot be so read.

We therefore submit that the Court erred in assuming that the contract gave the contractor the right to handle commercial traffic for a fixed period ending September 1, 1927, regardless of the termination of construction work before that date. It should be apparent, too, that if there was any such "commercial haulage" right, and if such non-construction work were "mutually exclusive in function," as the decision suggests, the commercial haul obligation could not be

enforced (except as to cars actually accepted for transportation while the contractor was engaged in the construction work) because of want of mutuality.

Appellee had no right, under its contract with appellant, to compel the acceptance of a single car of commercial traffic. No substantial log traffic during construction was contemplated when the contract was entered into (R. pp. 210-211), so that there is no analogy to contracts for a season's supply of merchandise, or for the requirements of an industry for a stated period.

Appellee was obligated to haul cars if and when requested to do so by appellant, but appellant was under no obligation to cause any cars to be hauled. Such an arrangement lacked mutuality and its cancellation by appellant cannot serve as the basis of a breach of contract claim.

The decision of this Court to the contrary ignores *Knox v. Lee*, 12 Wall. 457, 20 L. Ed. 287, *Maryland v. Railroad Company*, 22 Wall. 105, 112, 22 L. Ed. 713, and *Dennis v. Slyfield*, 117 Fed. 474.

(b) THE "STOP WORK" AND "CHANGE OF WORK" CLAUSES.

Appellant's resort to the stop work clause of the contract when the contractor's work on a part of the line was terminated seems to have misled the Court.

At least the decision seems to assume that the only question presented was whether the contractor's right to the commercial haul could be terminated under the stop work clause; appellant's contention that the contractor had no such continuing right seems to have been disregarded.

Appellant gave notice under the stop work clause, not in recognition of any right to continue the commercial haul but because appellee had asserted this right after having been told of appellant's plan to begin log transportation as soon as the track (on the first 29 miles) was usable (R. pp. 194-195, 200-201, 205, 210-211). Appellant maintains that the contract did not give appellee the right claimed; appellant further maintains that if the contract can be construed as giving appellee any such right, it was extinguished by the steps taken by appellant under the stop work clause.

The contract between the parties provided for the doing of certain work by appellee, the contractor. Appellant, the owner, reserved the right to stop this work, or any part thereof, at any time. This Court now says that, however plain and unambiguous the words, the parties did not mean this at all, but intended to say only that appellant's project, or any part of it, could be stopped. In result, the right to

stop any part of the work being done by the contractor at any time, for any reason, or for no reason, so plainly expressed in the contract without limitation or qualification, is now to be sharply limited; it is not to be exercisable at all unless the project, or the particular part involved, is to be halted, temporarily or permanently.

We respectfully submit that this Court, instead of interpreting the contract, has assumed an intent not stated in the document and has in effect rewritten the contract to state that intent. It is said that to stop the contractor's operations and then to continue the same work with the Railway Company forces would be inconsistent with the agreement that the contractor was to perform the work; and to resolve this inconsistency the Court found it necessary to construe the word "work", determining that it must have meant not the work in which the contractor was engaged at the time, but the project which was the subject of the contract.

This reasoning fails to recognize that the stop work reservation is a limitation upon the agreement entitling the contractor to perform the work. As such it creates no inconsistency or lack of harmony which would permit an exploration to find a meaning other than that stated by the plain words of the limitation.

In plain and unambiguous words, the Railway Com-

pany reserved the right to stop the Contractor from working, on the whole or on any part of the job. The reservation went further than this; the contractor could be required to reduce or diminish the force employed at any time. If the parties intended that this right could be exercised only when the project was to be discontinued or suspended, they failed to say so in their contract, and this Court has no right now to import such a limitation into the contract. That they did not so intend and that the "work" to be stopped was simply the work which the contractor was doing, is evident from the succeeding provision for *reducing* the force employed on the work at the Railway Company's direction. This could relate only to the work which the contractor was engaged to perform and was performing; it could have no application to work performed by anyone else.

We urge the Court to re-examine the succeeding paragraph of the contract on the subject of "accelerating work" upon which the decision relies for support of the conclusion reached as to the meaning of the word "work". Both paragraphs deal with *the work contracted for*, not with the railroad extension project apart from or independent of the particular contract entered into. It was the work contracted for by appellee, that could be stopped or reduced; and simi-

larly, it was the work which appellee had contracted to do that could be accelerated. Obviously it is referred to as "the work" in the provision for the employment of other means or agencies upon default of appellee. But it is nevertheless the work contracted for that was meant; and this is equally true of the "work" which could be stopped or reduced under the provisions of the stop work clause.

We think it apparent that the Court has resorted to rules of construction to impart to the word "work" in the stop work clause of the contract an ambiguity which does not in fact exist. This was clearly error; without an ambiguity in the words used, the Court had no right to seek elsewhere for the intent of the parties. The privilege of stopping or reducing the work could refer only to the work being done by the contractor. There is no occasion for the application of rules of construction; the substitution of the word "project" for the word "work" (and that is the effect of the decision), in order to place a limitation upon the reservation in accordance with the supposed intent of the parties, is entirely unwarranted.

We need not remind the Court that in construing questioned contracts, the duty to search out the intention of the parties arises from an ambiguity or omission which makes the meaning uncertain. If the

language used is plain, it must be enforced. *Kanasket Lumber & Shingle Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15.

Even though it may be thought that the true intention of the parties has not been expressed by the contract, the Court cannot rewrite the contract (at least in an action at law), and unless the contract is ambiguous, rules of construction cannot be invoked for the purpose of imparting ambiguity that does not in fact exist. *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489; *National Surety Co. v. McGreevy*, 64 F. (2d) 899.

The comments of the court in *Kentucky Rock Asphalt Co. v. Fidelity & Casualty Co. of New York*, 37 F. (2d) 279, 280, are in point:

> "The parties were competent to choose their own language and it must be assumed that they wrote the contract as they intended . . . To eliminate these provisions would be to write a new obligation for the parties into which they had not entered, or, in other words, to reform the contract, a relief permitted neither by the pleadings nor by the facts."

No precedent has been found, and we think none can be found, for the refusal to enforce the stop work reservation as written. *Marsch v. Southern New England R. Corp.*, 120 N. E. (Mass.) 120, 124, referred

to by the Court, concededly gives effect to a somewhat similar reservation although the continuance of the work by someone else was contemplated.

But this Court has misread this decision of the Massachusetts Supreme Court and has not given it the weight to which it is entitled. This Court's decision says (p. 5):

> "In a Massachusetts case a clause giving the Railway the right 'to suspend the progress of the work', on demurrer, was held to give the right not only to stop the contractor's performing the contract but to permit continuing the work by other persons."

The Court will find by examining the case (120 N. E. 120, 124) that it was not the clause relating to the suspension of the progress of the work that was questioned because of the purpose to give the work to someone else. The complaint asserted a breach of contract because certain portions of the work were taken away from him. This allegation was held insufficient because of the owner's right under the contract "to omit or deviate from the plans and specifications or work as it may deem expedient," without liability for damage for loss of anticipated profits because of any such "change, deviation or omission."

This Court's decision notes that after this ruling of the Massachusetts Supreme Court, the *Marsch* case

was dismissed (126 N. E. 519) and then recommenced in the Federal Court where a large judgment was given the contractor (45 F. 766, 767). The significance of this is not apparent; for aught that appears in the decision of the Circuit Court of Appeals affirming the judgment, the claim of lost profits for deprivation of work, which was disallowed by the Massachusetts Supreme Court, was abandoned.

Thus the only case discoverable, sufficiently similar in its facts to justify considering it a precedent, is squarely against the position taken by this Court. If the right to omit work or to deviate from plans or specifications as deemed expedient permitted the owner to lift parts of the work out of the contract and to engage others to do them, surely the right to stop any part of the work is to be literally enforced, no matter what plan the owners may have for subsequent performance of the work affected.

Appellant's argument that the "change of work" clause (the last paragraph of the contract, R. p. 72) confirms the unrestricted right to stop any part of the contractor's work seems to have been completely misunderstood. The decision says (p. 4):

> "The Railway argues in support of the contrary construction that it created no hardship to the Contractor to require it to stop work, since

> the work, including haulage, was to be paid for at unit prices and not by a lump sum for the line and haulage as a whole."

What appellant argued was that the contractor was safeguarded against hardship resulting from loss of any of the work by the provision of the contract for an *increase* of unit prices on the work remaining. (Appellant's Brief, pp. 44-46.) Any change in the amount of work to be done (and changes, *and consequently reductions,* in the amount of work embraced in the contract were specifically provided for, R. p. 72) called for a revision of the unit prices if in the judgment of the Chief Engineer the change materially affected the cost of doing the work (R. p. 72).

This provision of the contract seems to have escaped the Court's notice. Its importance is obvious. If the words "may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof" can possibly have some other meaning than that plainly expressed, and if resort to other provisions of the contract is warranted, we submit that the "change of work" clause with its provision for change of unit prices completely negatives the idea that parts of the work under way could not be stopped and later continued by the Railway Company, where the result was to deprive the contractor of profitable work.

This Court's decision says in effect that the parties did not mean what they said in the stop work clause of the contract. Because such provisions have been resorted to where the project was temporarily or permanently suspended, as in *Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co.*, 111 F. 695, this Court assumes that *only* on such occasions can the broad right here reserved be invoked. But the *Warren-Scharf* case justifies no such conclusion. Moreover, the decision in that case upheld the right to abrogate the contract entirely, even though the suspension of the project was only temporary, leaving the owner free to continue the work later through someone else and thus to deprive the contractor of the work originally contracted for. This is what the parties said in their contract and the Court could find no reason for declining to enforce it.

Appellant asks this Court similarly to enforce its contract with appellee as written.

2.

ADDITION OF INTEREST TO THE $125,000 DAMAGE AWARD

This Court's direction (Item D of the decision) to add ten years' interest to the damage award of $125,000 proceeds upon a misconception of the nature of the trial court's finding as to the damages sustained.

The decision assumes that the trial court arrived at the figure of $125,000 by estimating the number of car miles of log traffic run by appellant between July 17, 1927, and September 1, 1927, and then deducting the estimated operating costs which appellee would have incurred if it had conducted the operation. Upon this assumption, the decision speaks of the award of $125,000 "as the net amount the contractor would have left if the Railway had not failed to pay its agreed prices."

This assumption and the conclusion drawn from it have no basis in any finding of the trial court. On the contrary, Finding XVIII, which fixed the amount of the award (R. p. 169) and the trial court's opinion (R. pp. 339-340), make perfectly clear that because of lack of evidence on the subject, an estimate of net operating results for the period in question was not attempted. Instead the trial court proceeded, as a jury would have done had the case been tried to a jury, to fix a lump sum as the total damages attributable to the breach of contract.

Finding XVIII noted that the net operating results for two longer periods (July 17, 1927, to October 25, 1927, and July 17, 1927, to December 31, 1927) were ascertainable but there was nothing in the record to show how much of the total commercial haul

in these periods had moved *before* September 1, 1927, or during the period in which the contract was found to have been breached—July 17, 1927, to September 1, 1927 (R. p. 169). The oral opinion explained this and offered to receive further proof in order to ascertain the damages more accurately, but the offer was not taken advantage of. The trial court said (R. p. 340):

> "But, although figures were presented in detail for other periods, *there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st.* The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at $125,000. If the parties agree, however, further proof may be submitted upon this issue to find the damage more accurately." (Italics ours.)

It is beyond question, therefore, that the trial court did not undertake to ascertain the amount that appellee would have earned in hauling logs between July 17, 1927, and September 1, 1927. Instead, the sum fixed was intended to be the equivalent of a jury verdict, that is, an assessment of the total damages attributable to the breach of contract, inclusive of all elements necessary to make the award full compensation for appellee's loss up to the time of entry of judgment. By what right does this Court now assert that

the trial court was wrong in the determination of this fact issue,—that one element of the damages was omitted,—that the damage award was in truth an estimate of the net amount which appellee should have received in 1928, to which interest must be added to make the award complete compensation?

Whether $125,000 approximated what appellee would have earned in 1927, or whether the log movement was lighter in the beginning so that a much smaller sum would have been received, cannot be determined from the record. Perhaps the trial court thought the latter might be the fact, and concluded that $125,000 would be adequate to cover both the net earnings in the period and an additional allowance, the equivalent of interest, to compensate for the delay in getting the money.

But such inquiries are attempts to explore the mental processes of the trier of fact, and are entirely beyond the province of this Court. With the record such as to make the exact amount of damages impossible of ascertainment, the trial court fixed a lump sum as representative of the total damages sustained. This Court's direction to increase the damages by sixty per cent is unwarranted and beyond its power.

It has always been the rule in Oregon that "interest after the breach of a contract is recoverable only as

damages." *Ferguson v. Reiger*, 43 Or. 505, 73 Pac. 1040. *Seton v. Hoyt*, 34 Or. 266, 55 Pac. 967. In *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 480, 260 Pac. 1099, the Supreme Court of Oregon said:

> "It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was damaged in the sum of $1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease."

This Court's ruling, upon a question local to Oregon, is thus directly contrary to the decisions of the Oregon Supreme Court. But there is a further serious mistake in the decision with respect to the allowance of interest in Oregon. Even upon the premise assumed, —that the award of $125,000 was intended to represent the net amount appellee would have had left from the log hauling,—this amount was not determined, nor was it determinable, until after the Court had heard testimony and made a finding as to the costs appellee would have incurred if it had conducted the operation.

Whatever may be the rule elsewhere, the Oregon Supreme Court has uniformly held that a damage award is not due, within the meaning of the Oregon interest statute, until the amount payable has been definitely fixed. This means that in breach of contract actions which require a finding upon a fact issue to determine what shall be paid, the damages prior to such finding are unliquidated damages, and interest is not collectible under the Oregon statute until after judgment. This rule was announced in *Hawley v. Dawson*, 16 Or. 344, 349, 18 Pac. 592, and it has never been departed from. In *Williams v. Pacific Surety Co.*, 77 Or. 210, 221, 149 Pac. 524, 526, the Court said:

> "There is no controversy about the nature of this action. It is for unliquidated damages, and the rule is well settled in this state that interest cannot be recovered thereon."

See also *Duncan v. Willapa Lumber Co.*, 93 Or. 386, 400, 182 Pac. 172, 177, in which the court said that "the question is settled beyond further discussion in this state."

The decision of this Court declines to follow the rule of these cases, and says, with reference to the two last cited *(Williams v. Pacific Surety Co.* and *Duncan v. Willapa Lumber Co.)*:

> "These cases seem overruled by the reasoning in *North Pac. Const. Co. v. Wallowa County,* 119 Ore. 565, 572, so far as they hold that any lack of liquidation of damages defeats any right to interest under the Oregon statute."

This is a surprising conclusion to draw from the decision in the *Wallowa County* case, particularly since the Oregon Supreme Court in a later case from which we have already quoted *(Obermeier v. Mortgage Co. Holland-America,* 123 Or. 469, 260 Pac. 1099) restated the rule precluding the allowance of interest upon a damage award in a breach of contract action, apparently with no thought that this was in any respect inconsistent with the decision in the *Wallowa County* case.

This Court has misread the *Wallowa County* case. It was not an action for damages for breach of contract, but a suit based upon contract, seeking to recover compensation for work actually done under the contract. It was the familiar equity suit in which the finding of an engineer was challenged for fraud or gross mistake. The recovery sought in such cases is not in any sense damages for breach of contract, but *quantum meruit* for work performed. The suit is essentially one to enforce contract rights; a court of equity ascertains what is due under the contract because the method prescribed by the contract for deter-

mining this has failed through fraud or gross mistake. See *Sweeney v. County of Jackson*, 93 Or. 96, 120, 178 Pac. 365, 372, in which the function of the court in such suits is stated as follows:

> " . . . it is the duty of the court to set aside the final estimate and institute an independent inquiry as to the amount of compensation which the plaintiff has earned, and is justly entitled to under the contract."

There is therefore absolutely nothing in the decision in the *Wallowa County* case which alters in any way the rule always followed in Oregon. If there could be any doubt as to this, it is removed by the later decision in the *Obermeier* case. Interest is not allowable under the Oregon statute in breach of contract actions for unliquidated damages. The statute as thus construed is mandatory. As said in *Hawley v. Dawson*, 16 Or. 344, 349, "If it is desirable to have a more liberal rule as to interest, it is the province of the legislature to introduce it and not the court."

But it must not be thought that this restriction has operated harshly upon appellee, even upon the assumption that the award of $125,000 represented the profits appellee would have made in 1927. The long delay in liquidating these damages by verdict or finding is not in any respect attributable to appellant. Appellee was playing for much higher stakes; its in-

volved claim that the construction work was altered (the first claim or cause of action of the complaint) and that $326,785 additional was due for the construction work done (R. pp. 7-17), which claim was disallowed entirely (R. pp. 161-163), brought about the reference to an auditor, and the time-consuming procedural steps which followed. In addition, there was complete inaction for more than two years; at one time dismissal for want of prosecution under a rule of court was imminent (R. pp. 176-177, 330). In these circumstances the imposition of a heavy interest charge, upon the theory that appellee has been made to wait for its money, is altogether unjust. The damage claim for breach of the commercial haul clause of the contract could have been liquidated promptly had appellee so desired so that adherence to the rule of the Oregon interest statute would have worked no hardship upon it.

The theory upon which appellee claimed interest was that the contractor became entitled to the contract price at once when the logs were hauled, just as if it had conducted the haul, and that the deductible operating costs, thereafter estimated, were merely an offset or counterclaim which did not affect the obligation to pay the contract price at the time specified in the contract. (Opening Brief of Cross-Appellant, pp. 35-

36.) The fallacy of this is obvious; appellee did not conduct the haul and nothing was due for hauling service under the contract. If appellee was wrongfully deprived of the opportunity to do the hauling, it became entitled to damages measured by the net profits it would have made; and such profits could not be other than unliquidated damages until they were agreed to or judicially ascertained.

This Court proceeds upon a different theory. The decision seems to agree that the damages attributable to the alleged breach were unliquidated. It is said, however, that the Railway Company promised to pay these unliquidated damages at the time prescribed for payment of the balance certified to be due in the final estimate of the Chief Engineer. This, according to the decision, results from the contract requirement that the contractor must execute a full discharge of all claims upon receiving such final payment.

But the contract says just the opposite. It is the balance certified to be due by the Chief Engineer, and only such balance, which the Railway Company agreed to pay within thirty days after the date of the final estimate. Of course the contractor was required to release and discharge all claims upon receiving this payment. Obviously an owner would not make the payment if the contractor had unsettled claims and

refused to execute a full release. All that can be implied from this is that the contractor could not get the balance certified to be due by the Chief Engineer until the disputed claims were settled or adjudicated.

The Court's reasoning seems to be this: Because the contractor had to sign a full release of all claims before he could get the amount certified to be due by the Chief Engineer, and because the amount so certified was payable within thirty days after the date of the certificate, the agreement to pay such certified balance must be read as obligating the Railway Company to settle all disputes, or perhaps to litigate them, within the thirty-day period, and to pay then all damages which might be assessed for any breach of contract.

The books will be searched in vain for any such interpretation of a provision which undoubtedly has been in construction contracts for many years. Parties occasionally include in their contracts provisions for stipulated damages in the event of a breach. But we venture to say that until now it has not occurred to anyone that provisions for the execution of full releases at the time of final payment under a contract are to be read as defining the obligation of the loser in a subsequent breach of contract action, with re-

spect to the time when unliquidated damages are to be paid.

What has been said on this subject of course assumes that the $125,000 award was a determination of the net profit appellee would have made from the hauling, and not a finding of the full damage attributable to the alleged breach. This assumption we believe to be totally unwarranted. Making it for the purpose of the argument, we insist that appellant made no promise in its contract as to what it would do in the event it breached its contract. Certainly appellant nowhere in the contract agreed that it would pay, within thirty days of the date of the Chief Engineer's final estimate, damages the precise amount of which would not be known until the breach was established and the damages determined in subsequent litigation.

The Oregon statute forbids the allowance of interest in breach of contract actions prior to the ascertainment or liquidation of damages. This is the construction given the statute by the Oregon courts. The decision of this Court upon this local question is in conflict with the applicable Oregon decisions.

Respectfully submitted,

CHARLES A. HART,
Attorney for Appellant.

L. B. DA PONTE,
CAREY, HART, SPENCER & MCCULLOCH,
Of Counsel for Appellant.

I, CHARLES A. HART, counsel for appellant herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that said petition is not interposed for delay.

CHARLES A. HART,
Counsel for Appellant.

No. 8600

United States

Circuit Court of Appeals

For the Ninth Circuit.

MOORE DRY DOCK COMPANY, a corporation,

Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND, a widow and KENNETH HOWLAND, a minor,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Parker Printing Co., 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California.

No. 4181-R.

MOORE DRY DOCK COMPANY, a corporation,
Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND, a widow, and KENNETH HOWLAND, a minor,
Defendants.

COMPLAINT IN EQUITY FOR INJUNCTION.

To the Honorable, the Judges of the United States District Court for the Southern Division, Northern District of California:

The complaint in equity of Moore Dry Dock Company, a corporation, respectfully shows as follows:

I.

That plaintiff, Moore Dry Dock Company, was at all the times herein mentioned, and now is, a corporation duly created, organized and existing under the laws of the State of California [1]*

* Page numbering appearing at the foot of page of original certified Transcript of Record.

engaged in carrying on business within said State and elsewhere, and within the 13th Compensation District and within this district, and is a citizen and resident of said State and of this district.

II.

That defendant, Warren H. Pillsbury, was at all the times herein mentioned, and now is, the duly qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, with offices at San Francisco, California, and a citizen and resident of said State and of this district.

III.

That defendant, Margaret Howland was, at all times subsequent to the 21st day of March, 1936, the widow of William H. Howland, and that defendant, Kenneth Howland was, at all the times herein mentioned, and now is, the minor son of said William H. Howland, deceased, and said defendant, Margaret Howland, and that both of said defendants are residents and citizens of the State of California and of this district.

IV.

That plaintiff, Moore Dry Dock Company, was at all the times mentioned herein, and now is, engaged in the conduct and operation of a shipbuilding and ship repair plant situated on the

Oakland Estuary in the County of Alameda and within the said State of California, the said 13th Compensation District, and this district, and in the course of the conduct of its said business it was, at all the times herein mentioned, and now is, engaged in the operation of a certain power launch or tug known as the "Moore No. 2", 57 feet long, 14 foot beam and of a tonnage of 16 tons net, in use for the purpose of assisting vessels in and about the said shipyard of plaintiff and on and off drydocks therein contained and navigating, in the business of plaintiff, the [2] waters of San Francisco Bay and tributaries.

V.

That at all the times herein mentioned plaintiff was, and now is, qualified as a self-insurer under the Longshoremen and Harbor Workers' Compensation Act.

VI.

That this cause arises under a law of the United States, to-wit, the Longshoremen and Harbor Workers' Compensation Act, and that the amount in controversy is, exclusive of interest and costs, in excess of the sum or value of Three thousand dollars, ($3,000.00).

VII.

That on or about the 21st day of March, 1936, said William H. Howland, while performing serv-

ices for plaintiff as plaintiff's employee, on said launch or tug "Moore No. 2", then lying on the navigable waters of the United States at plaintiff's said shipyard, sustained personal injury occurring in the course of and arising out of his employment and resulting in death within a few minutes, in that while making some repairs on the deck of said launch to certain of its equipment he fell into the water and was drowned.

VIII.

That thereafter and on or about the 26th day of February, 1937, defendant Margaret Howland made claim for compensation by reason of the death of said William H. Howland under the terms and provisions of said Longshoremen and Harbor Workers' Compensation Act before defendant, Warren H. Pillsbury, and hearing thereon was held by said defendant, Warren H. Pillsbury, at Oakland, California, on the 27th day of March, 1937, at which time evidence was produced upon the issue of the character of the employment of said William H. Howland and his duties in connection therewith; that said hearing was continued to April 3, 1937 [3] and was subsequently continued to April 10 1937 and that on the 5th day of May, 1937, said defendant, Warren H. Pillsbury, made and entered his compensation order and award of compensation, a copy of which is hereto attached, marked "Exhibit

1", and by this reference made a part hereof as though fully set forth herein.

IX.

That from the uncontradicted evidence produced at said hearings, said defendant, Warren H. Pillsbury, found as follows:

(a) That said William H. Howland left surviving and wholly dependent upon him for support his said wife, defendant Margaret Howland, born July 31, 1881, and a minor son, defendant Kenneth Howland, born November 14, 1919 and approximately 16 years of age at the time of the death of said William H. Howland, who were living with him and supported by him at the time of his death.

(b) That notice of death was given within thirty days after the date of the injuries sustained by the said William H. Howland to plaintiff and to defendant, Warren H. Pillsbury; that no medical treatment was required and that the average annual earnings of the said William H. Howland at the time of his death amounted to the sum of $1,040.00; that there was no period of disability intervening between the time of the injury of the said William H. Howland and the time of his death;

(c) That said William H. Howland prior to his death had been carried upon the payroll of plaintiff's employees as a "rigger" and was paid

at an hourly rate for such work as was available for him in plaintiff's shipyard at rigger's wages; that most of his working time was devoted to services performed in and about, on and in connection with the operation of said launch while used by plaintiff to assist vessels entering or leaving said shipyard or the drydock therein, and in occasional errands about San Francisco Bay for the sole purposes of plaintiff; that upon [4] infrequent occasions said William H. Howland was given work as a rigger on land, not in connection with the operation of said launch; that while engaged in working on said launch he rendered the services usually performed by a deckhand, such as handling lines, mooring and unmooring the launch, keeping it clean, making occasional small repairs, serving on it while assisting ships entering or leaving the said shipyard or drydock, and that such services were rendered not only when the launch was actually in use, but also when it was tied up and moored; that said launch never left the waters of San Francisco Bay and tributaries and never went to sea, and that it was not necessary that the deckhand employed thereon should be qualified as a seaman; that said launch was, at all the times mentioned herein, operated by a personnel consisting of only two men, the master thereof, Captain George B. Marshall, and the deckhand thereon, said William H. Howland; that said William H. Howland ate and slept at home and that there were no accom-

modations for eating or sleeping on said launch; that he usually worked an eight-hour day on said launch, but was occasionally paid overtime for additional hours; that all the times herein mentioned said William H. Howland was employed exclusively by plaintiff and no one else.

X.

That by and pursuant to the said award of compensation, said defendant, Warren H. Pillsbury, held that the employment of said William H. Howland was essentially that of a harbor worker and not that of a seaman, as said term is used in the Longshoremen and Harbor Workers' Compensation Act, and that he was not a member of the crew of a vessel at the time of his injury and death.

XI.

That the award of compensation was therefore made against plaintiff in favor of defendant, Margaret Howland, for the support [5] of herself and her minor son, defendant Kenneth Howland, in the sum of $522.00 forthwith as of May 1, 1937, less, however, the sum of $125.00 to be deducted therefrom and paid by plaintiff to James R. Agee and Edmund D. Leonard, attorneys for defendant, Margaret Howland, as their attorneys' fee, and the further sum to defendant, Margaret Howland, of $9.00 a week payable in installments each two weeks or monthly at her election for the period

prescribed by law, and the further sum of $200.00 to said defendant, Margaret Howland, for burial expense.

XII.

That on the 20th day of May, 1937, defendant, Warren H. Pillsbury, modified said compensation order and award of compensation made May 5, 1937 by increasing the allowance for attorneys' fees from $125.00 to $200.00, a copy of which modification is attached hereto, numbered "Exhibit 2", and by this reference made a part hereof as though fully set forth herein.

XIII.

That the decision of defendant, Warren H. Pillsbury, that the employment of said William H. Howland was essentially that of a harbor worker and not that of a seaman as said term is used in the Longshoremen and Harbor Workers' Compensation Act, and that he was not a member of the crew of a vessel at the time of his injury and death, is entirely unsupported by and is directly contrary to the findings herein set forth and based upon the undisputed evidence given on behalf of plaintiff at said hearings.

XIV.

That the said determination and decision of the defendant, Warren H. Pillsbury, is invalid and erroneous and not in accordance with law for the

reason that said William H. Howland at the time of his said injury and death was in fact and in law a seaman and a member of the crew of a vessel and not a harbor worker within the meaning of said Longshoremen and Harbor Workers' [6] Compensation Act, and that therefore said William H. Howland was not, at the time of his said injury and death, subject to the operation of said Longshoremen and Harbor Workers' Compensation Act, and said defendant, Warren H. Pillsbury, had no jurisdiction to make said award and said defendants, Margaret Howland and Kenneth Howland are not entitled to the benefits of said Act nor to the terms and provisions of said award.

XV.

That plaintiff has no adequate nor any remedy at law and that said Longshoremen and Harbor Workers' Compensation Act provides that plaintiff may begin this proceeding in this court to suspend and set aside, in whole or in part, through injunction proceedings, said compensation order.

XVI.

That neither said award, nor any part thereof, has as yet been paid by plaintiff and unless payment of the amounts required by the said award shall be stayed pending final decision in this suit, plaintiff will be required to pay, under the terms of said award, large amounts of money, and in the event that final decision of this suit should be

that the said award is void and of no effect, plaintiff will be unable to recover payments made under said award for the reason that the defendants, Margaret Howland and Kenneth Howland, are financially irresponsible and have insufficient means to respond to any judgment which plaintiff might recover against them, to plaintiff's great and irreparable damage.

WHEREFORE, plaintiff prays:

1. That said defendant, Warren H. Pillsbury, be ordered to certify to this Court his proceedings, findings and determination, and to certify the record of the proceedings, testimony and evidence submitted at the hearings before him on March 27, 1937, [7] April 3, 1937 and April 10, 1937;

2. That at a time to be fixed by the Court for the hearing of this suit, the Court proceed to hear the cause de novo;

3. That pending final determination of this cause, the Court make its order suspending said award and relieving plaintiff from compliance therewith;

4. That upon final hearing of this cause the Court make its decree that the said award be suspended and set aside, annuled and vacated, and that an injunction issue herein perpetually restraining the enforcement of said compensation order and award of compensation;

5. That plaintiff may have such other, different and further relief as to the Court may seem equitable or just in the premises.

EMMETT CASHIN
HAROLD M. SAWYER
Solicitors for Plaintiff. [8]

State of California,
City and County of San Francisco—ss.

A. R. VINER, being first duly sworn, deposes and says:

That he is an officer, to-wit, Assistant Secretary, of Moore Dry Dock Company, the corporation named as plaintiff in the foregoing action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

A. R. VINER

Subscribed and sworn to before me this 2nd day of June, 1937.

[Seal] LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California. [9]

"EXHIBIT 1"

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
13th Compensation District

CASE NO. 8-723
CLAIM NO. 1042

In the matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

MARGARET HOWLAND, Widow, and
KENNETH HOWLAND, a Minor,

Claimants,

vs.

MOORE DRY DOCK COMPANY,

Employer.

Self-insurer

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 21st day of March, 1936, William H. Howland, husband and father of the claimants herein, was in the employ of the employer above named at Oakland, in the State of California in

the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was secured by self-insurance;

That on said day the said employee, while performing service for the employer on a launch then lying on the navigable waters of the United States at defendant's ship repair plant sustained personal injury occuring in the course of and arising out of his employment and resulting in death within a few minutes as follows: While making some repairs on the deck of said launch to certain of its equipment he fell into the water and was drowned; [10]

That the employee had been carried upon the payroll of the employer as a "rigger" and was paid at an hourly rate for such work as was available for him in defendant's shipyard at riggers' wages. Most of his working time was in connection with a launch used by the employer to assist vessels entering or leaving said shipyard or the dry dock therein, in occasional errands about San Francisco Bay only for the employer. Upon infrequent occasions the employee was given work as a rigger on land, not in connection with said launch. In working with said launch he rendered the service usually performed by a deck hand, such as handling lines, mooring and unmooring it, keeping it clean, making occasional small repairs, serv-

ing on it while assisting ships entering or leaving the yard or dry dock, etc., both when the launch was in use and when tied up. That said launch never went to sea, and that it was not necessary that the helper thereon be qualified a seaman. That the employee ate and slept at home and there were no accommodations for eating or sleeping on said launch. That he usually worked an eight-hour day thereon but was occasionally paid overtime for additional hours. That by reason of the foregoing it is found that the employment of said employee was essentially that of a harbor worker and not that of a seaman as said term is used in the Longshoremen's and Harbor Workers' Compensation Act, and that he was not a member of the crew of a vessel at the time of his injury and death;

That notice of death was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer;

That medical treatment was not required;

That the average annual earnings of the claimant herein at the time of his death amounted to the sum of $1040.00;

That there was no period of disability intervening between the time of the injury and the death; [11]

That the employee left surviving and wholly dependent upon him for support his wife, Margaret Howland, born July 31, 1881, and a minor son, Kenneth Howland, born November 14, 1919, and

approximately 16 years of age at the time of his death, who were living with him and supported by him at the time of his death. That said dependents are entitled to a death benefit of 45 per cent of the average weekly wages of the employee, or $9.00 a week beginning with March 22, 1936 and payable for the period prescribed by law; amount accrued to the last hearing, May 1, 1937, 58 weeks, is $522.00, no part of which has been paid;

That James R. Agee and Edmund D. Leonard, attorneys at law, have rendered legal service to the claimants in the prosecution of their claim of the reasonable value of $125.00 and are entitled to lien for said amount upon compensation herein awarded;

That the funeral expenses exceeded over $200.00. have been paid by Margaret Howland, and that she is entitled to reimbursement therefor.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

To claimant, Margaret Howland, for the support herself and her minor son Kenneth Howland, the sum of $522.00 forthwith as of May 1, 1937, less however the sum of $125.00 to be deducted therefrom and paid by defendant to James R. Agee and Edmund D. Leonard, claimant's attorneys, as their attorneys' fee, and the further sum to claimant of $9.00 a week payable in installments each two weeks, or monthly at her election, for the period prescribed by law;

To claimant the further sum of $200.00 upon the burial expense.

Given under my hand at San Francisco, California, this 5th day of May, 1937.

WARREN H. PILLSBURY
Deputy Commissioner
13th Compensation District

WHP:r

eb [12]

"EXHIBIT 2"

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
13th Compensation District

CASE NO. 8-725
CLAIM NO. 1043

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

MRS. MARGARET HOWLAND, Widow, and KENNETH HOWLAND, a Minor

Claimants,

against

MOORE DRY DOCK CO.

Employer

Self-Insurer.

ORDER INCREASING ATTORNEYS' FEE

Upon a further specification of the amount of service performed by claimant's attorneys in the

above case and written consent of claimant, the fee fixed in the compensation order of May 5, 1937 for said attorneys is raised from $125.00 to $200.00 and lien granted therefor upon compensation herein awarded in the place and stead of the previous fee allowed.

Given under my hand at San Francisco, California, this 20th day of May, 1937.

WARREN H. PILLSBURY
Deputy Commissioner
13th Compensation District.

WHP:eb

[Endorsed]: Filed Jun 3, 1937. [13]

District Court of the United States, Northern District of California, Southern Division

M D No. 22687 Civil. Received Jun 3 1937 U S Marshal's Office San Francisco, Calif.

IN EQUITY

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND, a widow and KENNETH HOWLAND, a minor, GREETING:

SUBPOENA.

YOU ARE HEREBY COMMANDED, that you be and appear in the Southern Division of the

United States District Court for the Northern District of California, aforesaid, at the Court Room in the City of San Francisco, within twenty days after service hereof, to answer a Bill of Complaint exhibited against you in said Court by MOORE DRY DOCK COMPANY, a corporation, which is a citizen of the State of California and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable MICHAEL J. ROCHE, Judge of said District Court, this 3rd day of June in the year of our Lord one thousand nine hundred and thirty-seven and of our Independence the 161st.

[Seal] WALTER B. MALING

Clerk.

By J. P. WELSH

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office

of said Court, pursuant to said Bill: otherwise the said Bill may be taken Pro Confesso.

WALTER B. MALING
Clerk.
By J. P. WELSH
Deputy Clerk.

RETURN ON SERVICE OF WRIT

United States of America,
District of —ss.

I hereby certify and return that I served the annexed Subpoena ad respondendum and Order to Show Cause on the therein-named Margaret Howland by handing to and leaving a true and correct copy thereof with Margaret Howland personally at Oakland, California in said District on the 4th day of June, A.D. 1937.

GEORGE VICE
U. S. Marshal.
By BERNARD J. WARD
Deputy.

RETURN ON SERVICE OF WRIT

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad respondendum and Order to Show Cause on the therein-named Kenneth Howland by handing to and leaving a true and correct copy thereof with Kenneth Howland per-

sonally at Oakland, Calif. in said District on the 4th day of June, A.D. 1937.

GEORGE VICE
U. S. Marshal.
By BERNARD J. WARD
Deputy.

RETURN ON SERVICE OF WRIT

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad respondendum and Order to show cause on the therein-named Warren H. Pillsbury Deputy Commissioner of United States Employees' Compensation Commission by handing to and leaving a true and correct copy thereof together with copy of complaint with C. de Hersor, Secretary to Warren H. Pillsbury personally at San Francisco, Calif. in said District on the 4th day of June, A.D. 1937.

GEORGE VICE
U. S. Marshal.
By BERNARD J. WARD Jr.
Deputy.

MARSHAL'S FEES

Travel	$2.00
Service	12.00
	$14.00

[Endorsed]: Filed Jun 4, 1937. [14]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the complaint in equity for an injunction of plaintiff above-named, verified by A. R. Viner, Assistant Secretary of plaintiff, June 2nd, 1937, and the Court being now fully advised in the premises, and sufficient reason appearing therefor,

IT IS NOW, upon motion of Harold M. Sawyer, Esq., one of plaintiff's Solicitors, ORDERED that the defendants herein, to- [15] wit, Warren H. Pillsbury, Margaret Howland and Kenneth Howland, appear before me in my Courtroom in the Postoffice Building at the corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, at the hour of ten o'clock in the morning of the 9th day of June, 1937, or as soon thereafter as counsel can be heard, and show cause why, pending the final determination of the above cause, the compensation order and award in favor of defendants, Margaret Howland and Kenneth Howland, made and entered by defendant, Warren H. Pillsbury, as Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, on the 5th day of May, 1937, should not be temporarily suspended and set aside and plaintiff above-named be relieved temporarily from compliance therewith.

Service of a copy of this order, if made before

5 o'clock p.m. of the 4th day of June, 1937 shall be sufficient.

DATED: San Francisco, California, this 3rd day of June, 1937.

MICHAEL J. ROCHE,
Judge of the District Court.

[Endorsed]: Filed Jun 3, 1937. [16]

[Title of Court and Cause.]

RETURN OF ORDER TO SHOW CAUSE

Comes now WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, through his attorney, A. J. ZIRPOLI, Assistant United States Attorney for the Northern District of California, and for cause why, pending the final determination of the above entitled cause, the compensation order and award in favor of defendants MARGARET HOWLAND and KENNETH HOWLAND, made and entered by the defendant, Warren K. Pillsbury, as Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, on the 5th day of May, 1937, should not be temporarily suspended and set aside and plaintiff above named relieved temporarily from compliance therewith, shows, as follows:

I.

That the compensation order and award which the plaintiff seeks to have temporarily set aside and

from compliance with which he seeks relief was made and entered by the defendant, Warren H. Pillsbury, Deputy Commissioner of United States Employees' Compensation Commission as aforesaid. in favor of defendants MARGARET HOWLAND and KENNETH HOWLAND and against plaintiff Moore Dry Dock Company, a corporation, on the 5th day of May, 1937, and thereafter in part amended on the 20th day of May, 1937; true and correct copies of said award and amendment were attached to plaintiff's complaint in equity for injunctive relief filed in the above entitled cause as Exhibits 1 and 2. [17]

II.

That the financial irresponsibility of the defendants MARGARET HOWLAND and KENNETH HOWLAND and their inability to respond to any judgment that plaintiff might recover against them for payments made under the award mentioned in paragraph I hereof in the event that the above entitled Court sees fit to grant the prayer in plaintiff's bill of complaint on file herein, does not constitute irreparable damage so as to entitle plaintiff to the injunctive relief prayed for in his order to show cause.

WHEREFORE, the defendant WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission as aforesaid, prays that the order to show cause why his award of May 5, 1937 should not be temporarily

suspended and set aside and plaintiff above named relieved from temporary compliance therewith be dismissed and plaintiff's request for temporary injunction be denied.

A. J. ZIRPOLI,
Assistant United States Attorney for the Northern District of California.

[Endorsed]: Filed Jun 9, 1937. [18]

In the Southern Division of the United States District Court, for the Northern District of California.

No. 4181-R.

MOORE DRY DOCK COMPANY, a corporation,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND, a widow, and KENNETH HOWLAND, a minor,

Defendants.

ORDER DISCHARGING ORDER TO SHOW CAUSE AND DENYING APPLICATION FOR A TEMPORARY INJUNCTION.

This matter coming on to be heard upon an Order to Show Cause returnable June 9, 1937, before me, why, upon the allegations of the verified complaint

herein an injunction should not be issued pending final determination of the above cause restraining defendants from enforcing the terms of an award in favor of defendant, Margaret Howland, and defendant, Kenneth Howland, made [19] May 5, 1937 by defendant, Warren H. Pillsbury, and the plaintiff herein having appeared by Harold M. Sawyer, Esq., one of its solicitors, and the defendants, Margaret Howland and Kenneth Howland having appeared by Gordon S. Keith, one of their solicitors, and defendant, Warren H. Pillsbury, having appeared by A. J. Zirpoli, Esq., Assistant United States Attorney for this district, as his solicitor, and the application for an injunction pendente lite having been argued upon the allegations of paragraph XVI of the verified complaint, and the return to the order to show cause made by defendant Warren H. Pillsbury and filed herein June 9, 1937, and no affidavits in opposition to said verified complaint having been filed, and the court now being fully advised in the premises.

The court finds that the allegations of paragraph XVI of the verified complaint herein do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, and for that reason,

IT IS NOW ORDERED that the order to show cause herein be, and the same is hereby discharged

and that the application for an injunction pendente lite be, and the same hereby is, denied.

Exception to this order taken in open court by plaintiff's solicitor, Harold M. Sawyer, is hereby allowed.

DATED: San Francisco, California, June 10th, 1937.

MICHAEL J. ROCHE,
District Judge.

Approved as to form:

S. P. MURMAN,
Assistant United States Attorney for the Northern District of California.

Approved as to form:

GORDON S. KEITH,
Solicitor for defendants, Margaret Howland and Kenneth Howland.

[Endorsed]: Filed Jun 10, 1937. [20]

[Title of Court and Cause.]

PETITION FOR APPEAL

To the Honorable Michael J. Roche, District Judge:

The above-named plaintiff, Moore Dry Dock Company, a corporation, feeling aggrieved by the order made and entered in the above-entitled cause on the 9th day of June 1937, discharging an order to show cause returnable in the above court on said

9th day of June, 1937, why, upon the verified complaint herein, an [21] award in favor of the defendants, Margaret Howland and Kenneth Howland made by defendant, Warren H. Pillsbury on the 5th day of May, 1937, should not be temporarily suspended pending final decree herein and the defendants be temporarily enjoined from enforcing the same, and denying the temporary injunction, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which the said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the rules of said court in such case made and provided.

DATED: June 25th, 1937.

EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Plaintiff.

[Endorsed]: Filed Jun 25, 1937. [22]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

MOORE DRY DOCK COMPANY, a corporation, plaintiff herein, asserts that in the record and proceedings in the above-entitled cause and in the in-

terlocutory order entered herein June 1937, discharging an order to show cause why, pending final decree herein, the defendants should not be enjoined from enforcing the award in suit, and denying an injunction pendente lite, there is manifest error in the following particulars: [23]

FIRST: The Court erred in discharging the order to show cause why, pending final decree herein, defendants should not be restrained from enforcing the award in suit and in denying the application for the injunction pendente lite, to which denial plaintiff duly excepted and its exception was allowed.

SECOND: The Court erred in holding that the uncontradicted allegations of the verified complaint herein, and particularly the allegations of paragraph XVI thereof, do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, to which holding plaintiff duly excepted and its exception was allowed.

THIRD: The Court erred in that by discharging said order to show cause and denying the application for an injunction pendente lite the Court, in effect, subjected plaintiff to the penalties of Section 14 of said Longshoremen and Harbor Workers' Compensation Act for having failed to pay said award within the time provided by said Act, notwithstanding the fact that plaintiff had in good faith,

by the verified complaint herein, challenged the jurisdiction of defendant, Warren H. Pillsbury, to make the award in suit in the first instance.

WHEREFORE, plaintiff prays that said interlocutory order made and entered herein June 10th, 1937, be reversed and that the District Court be directed by the Circuit Court of Appeals for the Ninth Circuit to issue an injunction pending final decree herein restraining the defendants from enforcing the award in suit.

DATED: June 25th, 1937.

EMMETT CASHIN,
HAROLD M. SAWYER
Solicitors for Plaintiff.

[Endorsed]: Filed Jun 25, 1937. [24]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On motion of Harold M. Sawyer, Esq., of solicitors for plaintiff above-named, IT IS HEREBY ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the interlocutory order made and entered herein on the 10th day of June, 1937, discharging an order to show cause why, pending final decree herein, the defendants should not be restrained from enforcing the award in suit, and denying the application for an injunction pendente lite, be, and the same is

hereby allowed and [25] that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit,

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Two hundred and Fifty Dollars, ($250.00), as a bond for costs and damages on appeal.

DATED: June 25th, 1937.

MICHAEL J. ROCHE
District Judge.

[Endorsed]: Filed Jun 25, 1937. [26]

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, MOORE DRY DOCK COMPANY, a corporation, as principal and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, as sureties, are held and firmly bound unto WARREN H. PILLSBURY, etc., MARGARET HOWLAND, a widow, and KENNETH HOWLAND, a minor in the full and just sum of Two hundred and fifty ($250.00) dollars, to be paid to the said WARREN H. PILLSBURY, etc., MARGARET HOWLAND and KENNETH HOWLAND certain attorney, executors, administrators, or assigns; to which payment, well and

truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of June in the year of our Lord One Thousand Nine Hundred and thirty-seven.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court, between Moore Dry Dock Company, a corporation, plaintiff, vs. Warren H. Pillsbury, Deputy Commissioner of United States Employees' Compensation Commission for the 13th Compensation District, Margaret Howland, a widow, and Kenneth Howland, a minor, defendants an order was made against the said Moore Dry Dock Company, plaintiff, and the said Moore Dry Dock Company, a corporation, having obtained from said Court an order permitting an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said Warren H. Pillsbury, etc., Margaret Howland and Kenneth Howland, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the thirtieth day from the 25th day of June, 1937.

Now, the condition of the above obligation is such, That if the said Moore Dry Dock Company,

a corporation, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

[Seal] MOORE DRY DOCK COMPANY
J. A. MOORE
Pres.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
By HARRY C. MILLER
Attorney-in-Fact.

Acknowledged before me the day and year first above written.

.....

State of California
City and County of San Francisco—ss.

On this 29th day of June in the year one thousand nine hundred and thirty-seven, before me, Dorothy H. McLennan, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Jos. A. Moore known to me

to be the President of the corporation described in and that executed the within instrument, and also known to me to be the person—who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] DOROTHY H. McLENNAN,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 24, 1938.

It is further hereby expressly agreed that in case of a breach of any condition of the above obligation and this bond, the said Southern Division of the United States District Court for the Northern District of California, Second Division, may, upon notice to the INDEMNITY INSURANCE COMPANY OF NORTH AMERICA of not less than ten (10) days, proceed summarily in the above entitled case therein pending to ascertain the amount which said INDEMNITY INSURANCE COMPANY OF NORTH AMERICA is bound to pay

on account of such breach, and render judgment therefor against it, and award execution therefor.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
By: HARRY C. MILLER,
Attorney-in-Fact

MOORE DRY DOCK COMPANY
JOS. A. MOORE
President

State of California,
City and County of San Francisco—ss.

On this 28th day of June in the year one thousand nine hundred and thirty seven, before me Emily K. McCorry, a Notary Public in and for the City and County of San Francisco personally appeared Harry C. Miller, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] EMILY K. McCORRY
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 16th, 1939.

[Endorsed]: Filed Jul 1, 1937. [27]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are requested to take a transcript of the record and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, omitting all captions and endorsements and all verifications except the verification of the complaint, but containing all proofs of service, and to include [28] in such transcript of record the following and no other papers, that is to say:

1. Subpoena;

2. Complaint;

3. Order to show cause and proof of service;

4. Return of order to show cause by Warren H. Pillsbury;

5. Order discharging order to show cause and denying application for a temporary injunction;

6. Petition for appeal;

7. Assignment of Errors;

8. Order allowing appeal and fixing amount of cost bond;

9. Citation and proof of service;

10. Bond on appeal;

11. Your certificate under Rule 75 that no evidence was taken;
12. This Praecipe and proof of service;
13. Your certificate.

EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Plaintiff.

Receipt of a copy hereof admitted this 30th day of June, 1937.

H. H. McPIKE,
United States Attorney.
WARREN H. PILLSBURY,
Solicitor for Defendant.
KEITH & CREEDE,
Solicitor for defendants, Margaret Howland and Kenneth Howland.

[Endorsed]: June 30, 1937. [29]

In the Southern Division of the United State District Court for the Northern District of California.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 29 pages, numbered from 1 to 29, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled MOORE DRY DOCK COMPANY, Plaintiff, vs. WARREN H. PILLS-

BURY, etc., et al, No. Equity 4181-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $4.40 and that the said amount has been paid to me by the Attorneys for the appellant herein.

I further certify that no evidence was taken and the issue was determined solely from the records submitted herewith and oral argument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of July, A. D. 1937.

[Seal] WALTER B. MALING,
Clerk.

By J. P. Welsh, Deputy Clerk. [30]

CITATION ON APPEAL

UNITED STATES OF AMERICA—ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District; Margaret Howland, a widow, and Kenneth Howland, a minor, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit

Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein Moore Dry Dock Company, a corporation is appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MICHAEL J. ROCHE, United States District Court Judge for the Northern District of California this 25th day of June, A. D. 1937.

MICHAEL J. ROCHE,
United States District Judge.

Receipt of a copy of the within is hereby admitted this 29th day of June, 1937.

KEITH & CREEDE,
GORDON S. KEITH,

Receipt of a copy of the within is hereby admitted this 29th day of June, 1937.

H. H. McPIKE,

[Endorsed]: Filed Jun. 29, 1937 [31]

[Endorsed]: No. 8600. United States Circuit Court of Appeals for the Ninth Circuit. Moore Dry Dock Company, a corporation, Appellant, vs. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, Margaret Howland, a widow and Kenneth Howland, a minor, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 14, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE DRYDOCK COMPANY (a corporation),
Appellant,

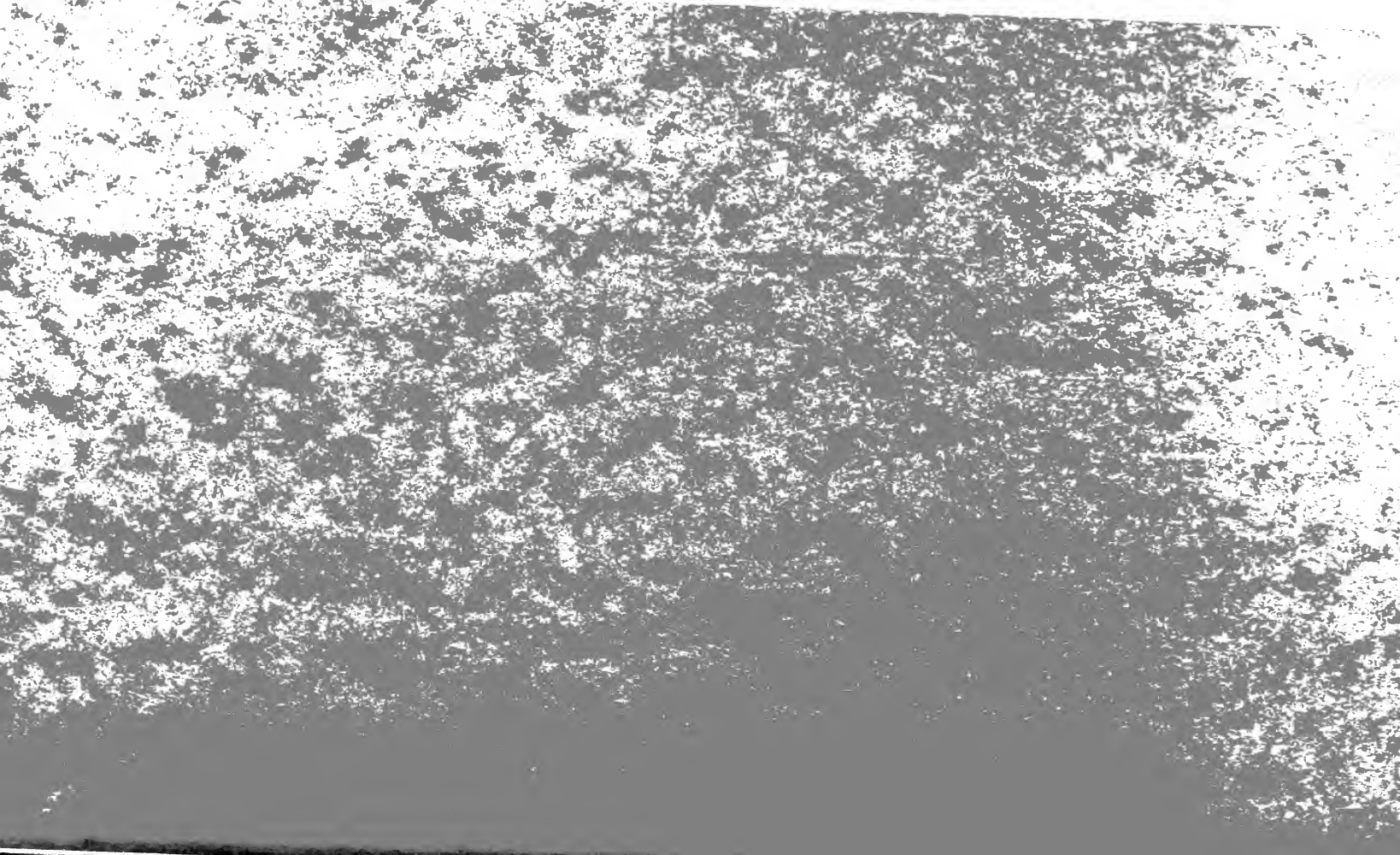
vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor),
Appellees.

BRIEF FOR APPELLANT.

EMMETT CASHIN,
HAROLD M. SAWYER,
351 California Street, San Francisco,
Solicitors for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO



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No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE DRYDOCK COMPANY (a corporation),
Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor),
Appellees.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from an order of the District Court denying appellant's application for an interlocutory injunction (R. 25) in injunction proceedings (R. 2) instituted by appellant to suspend or set aside a compensation order (R. 13) made by respondent Warren H. Pillsbury, Deputy Commissioner of the 13th Compensation District against appellant and in favor of respondents Margaret and Kenneth Howland pursuant to the alleged authority of the Longshore-

men and Harbor Workers' Compensation Act (33 *U.S.C.A.* Secs. 901 to 950, inclusive, and particularly Sec. 921).

Appellant's application came on for hearing in the District Court upon appellant's verified complaint in equity (R. 2), an order to show cause issued thereon and directed to respondents (R. 22), and the return of order to show cause made by respondent Warren H. Pillsbury. (R. 23.) According to the clerk's certificate filed pursuant to Equity Rule 75 of the Supreme Court of the United States, no evidence was taken and the issue was determined solely from the records enumerated above, and oral argument. (R. 38.)

The jurisdiction of this court upon appeal to review this order of the District Court is created by section 129 of the *Judicial Code,* as amended. (28 *U.S.C.A.* Sec. 227.) The following cases are believed to support the jurisdiction of the court:

The Transfer No. 21, 218 Fed. 636;

Ward Bacon Co. v. Weber, 230 Fed. 142;

Mississippi Valley Trust Co. v. Railway Steel Spring Co., 258 Fed. 346;

Northwestern Stevedoring Co. v. Marshall, 41 Fed. (2d) 28.

The full text of 33 *U.S.C.A.* Sec. 921, the pertinent section of the Longshoremen and Harbor Workers' Compensation Act, and of Section 129 of the *Judicial Code* as amended, 28 *U.S.C.A.* Sec. 227, is set out in the appendix.

II.

STATEMENT OF THE CASE.

On March 21, 1936, appellant was engaged in the conduct and operation of a shipbuilding and ship repair plant situated on the Oakland Estuary in the County of Alameda, State of California, and within the 13th Compensation District established under the provisions of the Longshoremen and Harbor Workers' Compensation Act, and in the course of the conduct of its business it was, on said day, engaged in the operation of a certain power launch or tug known as the "Moore No. 2", 57 feet long, 14 foot beam, and of a tonnage of 16 tons net, in use for the purpose of assisting vessels in and about appellant's shipyard and on and off drydocks contained therein, and navigating, in the business of appellant, the waters of San Francisco Bay and tributaries. (R. 3, 4.)

At all times mentioned herein, appellant was a qualified self-insurer under the Longshoremen and Harbor Workers' Act. (R. 4.)

On March 21, 1936, William H. Howland, husband and father of respondents, Margaret and Kenneth Howland, while performing services for appellant as appellant's employee on the said launch or tug "Moore No. 2", then lying on the navigable waters of the United States at appellant's shipyard, sustained personal injury occurring in the course of and arising out of his employment and resulting in death within a few minutes, in that while making some repairs on the deck of the launch to certain of its equipment, he fell into the water and was drowned. (R. 4, 5.)

After notice and hearing, respondent Warren H. Pillsbury made certain findings of fact (R. 14, 15), upon the basis of which he concluded that the deceased Howland was a harbor worker and not a member of the crew of any vessel, whereupon said respondent made an award under date of May 20, 1937, against appellant and in favor of respondents Margaret and Kenneth Howland. (R. 14, 15, 16.)

On June 3, 1937 (R. 18) appellant, pursuant to the provisions of 33 *U.S.C.A.* Sec. 921, sought to review said compensation order through injunction proceedings by filing a verified complaint in equity for an injunction setting aside and enjoining the enforcement of said award (R. 2), and on the same day the District Judge issued an order to show cause, returnable June 9, 1937, why an interlocutory injunction staying the payment of the award pending final decision should not be issued. (R. 22.) On the return day, respondent Warren H. Pillsbury made a return to the order to show cause (R. 23), and the matter came on for hearing upon the verified complaint and the return, at the conclusion of which the District Court made an order discharging the order to show cause and denying the application for an interlocutory injunction. (R. 25.) From this order this appeal is prosecuted.

The application for the interlocutory injunction was made pursuant to the terms of 33 *U.S.C.A.* Sec. 921, and was predicated upon the allegation of irreparable damage found in paragraph XVI of the verified complaint (R. 10, 11), the language of which is as follows:

"That neither said award, nor any part thereof, has as yet been paid by plaintiff and unless payment of the amounts required by the said award shall be stayed pending final decision in this suit, plaintiff will be required to pay, under the terms of said award, large amounts of money, and in the event that final decision of this suit should be that the said award is void and of no effect, plaintiff will be unable to recover payments made under said award for the reason that the defendants, Margaret Howland and Kenneth Howland, are financially irresponsible and have insufficient means to respond to any judgment which plaintiff might recover against them, to plaintiff's great and irreparable damage."

This allegation was not controverted by any opposing affidavit and its truth was tacitly admitted by the return. (R. 24.) Respondent's contention, however, was that the facts set forth did not and do not constitute irreparable damage. Such is the specific finding made by the District Court in its order denying the interlocutory injunction. (R. 26.)

III.

THE QUESTION INVOLVED.

The question involved is whether financial irresponsibility and lack of means to repay is sufficient evidence of irreparable damage in a case where no recovery can be had from the respondents if the appellant is compelled to make payments under the award pending final adjudication of its validity.

IV.

ASSIGNMENT OF ERRORS.

First. The court erred in discharging the order to show cause why, pending final decree herein, defendants should not be restrained from enforcing the award in suit and in denying the application for the injunction *pendente lite,* to which denial plaintiff duly excepted and its exception was allowed. (R. 29.)

Second. The court erred in holding that the uncontradicted allegations of the verified complaint herein, and particularly the allegations of paragraph XVI thereof, do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, to which holding plaintiff duly excepted and its exception was allowed. (R. 29.)

Third. The court erred in that by discharging said order to show cause and denying the application for an injunction *pendente lite* the court, in effect, subjected plaintiff to the penalties of Section 14 of said Longshoremen and Harbor Workers' Compensation Act for having failed to pay said award within the time provided by said Act, notwithstanding the fact that plaintiff had in good faith, by the verified complaint herein, challenged the jurisdiction of defendant Warren H. Pillsbury to make the award in suit in the first instance. (R. 29, 30.)

V.

SUMMARY OF ARGUMENT.

1. Irreparable damage had a well defined meaning in equity at the time the Longshoremen and Harbor Workers' Compensation Act was adopted by Congress in 1927. Financial irresponsibility, lack of means to repay and insolvency have, from time immemorial, always been considered sufficient evidence of irreparable damage whenever a litigant has sought temporary relief from a questioned obligation.

2. When Congress provided, in 33 *U.S.C.A.* Sec. 921, that no interlocutory injunction should be issued except upon proof of irreparable damage, it certainly had no apparent intention of using the phrase "irreparable damage" in any other sense or meaning than that which has been ascribed to it for the last hundred years.

3. Consequently, irreparable damage in 33 *U.S.C.A.* Sec. 921 means exactly what it meant in courts of equity prior to and at the time the Act was passed.

4. Appellant's showing of irreparable damage was classical and an interlocutory injunction should have issued in the court below.

VI.

ARGUMENT.

1. IRREPARABLE DAMAGE HAD A WELL DEFINED MEANING IN EQUITY AT THE TIME THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT WAS ADOPTED BY CONGRESS IN 1927. FINANCIAL IRRESPONSIBILITY, LACK OF MEANS TO REPAY, AND INSOLVENCY HAVE, FROM TIME IMMEMORIAL, ALWAYS BEEN CONSIDERED SUFFICIENT EVIDENCE OF IRREPARABLE DAMAGE WHENEVER A LITIGANT HAS SOUGHT TEMPORARY RELIEF FROM A QUESTIONED OBLIGATION.

The three assignments of error are designed to raise substantially the same question, namely, that a showing that the respondents are financially irresponsible and lack means to pay, constitutes irreparable damage sufficient to justify the issuance of an interlocutory injunction restraining the enforcement of a questioned award pending final determination on the merits. The three assignments are as follows:

> *First.* The court erred in discharging the order to show cause why, pending final decree herein, defendants should not be restrained from enforcing the award in suit and in denying the application for the injunction *pendente lite,* to which denial plaintiff duly excepted and its exception was allowed. (R. 29.)
>
> *Second.* The court erred in holding that the uncontradicted allegations of the verified complaint herein, and particularly the allegations of paragraph XVI thereof, do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, to which holding plaintiff duly excepted and its exception was allowed. (R. 29.)

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The only question in this case is a determination of the issue whether or not appellant's showing of irreparable damage was sufficient to entitle it to the protection of an interlocutory injunction pending final determination of the cause. That was the sole question considered in the court below, and for the reason that we believe that neither the district nor this court has any jurisdiction to determine the validity of the compensation award itself, we shall refrain from any discussion of the merits. (*Ex parte National Enameling & S. Co.*, 201 U. S. 156, 50 L. Ed. 707.) We shall content ourselves with the mere observation that if the deceased Howland was a member of the crew of the "Moore No. 2" at the time of his death, he was exempted by 33 *U.S.C.A.* Sec. 903 (a) 1 from the operation of the Act and the award is void. On the other hand, if he was not a member of the crew, the award is valid and the complaint for an injunction to review it in the District Court should be dismissed.

These matters are, however, it is submitted, not before this court at this time.

At the time Congress passed the Longshoremen and Harbor Workers' Compensation Act in 1927, the phrase "irreparable damage" had attained a settled meaning and construction in equity jurisprudence. It is elementary that where the plaintiff has an adequate remedy at law, equity has no jurisdiction. Adequacy, however, means not only that the law must afford a remedy, but also that it must be an effective one. A judgment against a defendant who is financially irresponsible, lacks means to pay, or is insolvent, is no practical remedy at all. Hence, these factors have always been considered by courts of equity in determining whether or not a plaintiff's damage is irreparable. The following cases clearly show that the application of this doctrine is nearly universal throughout the United States. These cases hold that financial irresponsibility, lack of means to pay, or insolvency constitute a showing of irreparable damage. Some of them arose on applications for interlocutory injunction and others upon final decree. The former are marked with a star (*) but the distinction between the two is entirely immaterial because the principles involved in both classes are identical:

Wheeler v. Lack, 37 Ore. 238, 61 Pac. 849;

**Saltus v. Bedford Co.,* 133 N. Y. 499;

Ponder v. Cox, 28 Ga. 305;

Smallman v. Onions, 3 Bro. Ch. 621, 29 Repr. 733;

Hodgson v. Duce, 2 Jurist (N. S.) 1014, 28 L. T. O. S. 155;

Lewis v. Christian, 40 Ga. 187;

Deming v. James, 72 Ill. 78;

Brownston v. Cropper, 1 Litt. 173, 11 Ky. 173;

**Jones v. Stanton,* 11 Mo. 433;

Amoskeag Mfg. Co. v. Shirley, 69 N. H. 269, 39 Atl. 976;

**Phillips v. Trezefant,* 67 N. C. 370;

Chattanooga Grocery Co. v. Livingston, 59 S. W. 470;

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**Title Guaranty etc. Co. v. Brown,* 125 N. Y. S. 780;

**Wolff v. Altman,* 187 N. Y. S. 902;

Friedberg, Inc. v. McClary, 173 Ky. 579, 191 S. W. 300;

Williams v. Harrison, 135 Mo. App. 152, 115 S. W. 1056;

High on Injunctions, 4th Ed. Vol. 1, p. 372, Sec. 400;

Beach on Injunctions, Vol. 1, p. 42, Sec. 34;

American & English Encyclopedia of Law, 2nd Ed. Vol. 16, p. 361.

To the same effect see:

Drury v. Roberts, 2 Md. Ch. 157;

Walton v. Bonham, 24 Ala. 531;

Shoemaker v. S. B. Spark etc. Co., 135 Ind. 471, 35 N. E. 280.

In California alone there are two cases in which it was held that the court would enjoin a trespass where the defendant was insolvent:

Hicks v. Compton, 18 Cal. 206;

West v. Smith, 52 Cal. 322.

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2. **WHEN CONGRESS PROVIDED, IN 33 U.S.C.A. SEC. 921, THAT NO INTERLOCUTORY INJUNCTION SHOULD BE ISSUED EXCEPT UPON PROOF OF IRREPARABLE DAMAGE, IT CERTAINLY HAD NO APPARENT INTENTION OF USING THE PHRASE "IRREPARABLE DAMAGE" IN ANY OTHER SENSE OR MEANING THAN THAT WHICH HAS BEEN ASCRIBED TO IT FOR THE LAST HUNDRED YEARS. CONSEQUENTLY, IRREPARABLE DAMAGE IN 33 U.S.C.A. SEC. 921 MEANS EXACTLY WHAT IT MEANT IN COURTS OF EQUITY PRIOR TO AND AT THE TIME THE ACT WAS PASSED.**

The provision in 33 *U.S.C.A.* Sec. 921 to the effect that payment of the amounts required by an award shall not be stayed pending final decision unless irreparable damage will ensue to the employer is merely declaratory of a universal rule. As has already been stated, the phrase "irreparable damage" had a settled construction at the time of the passage of the Act. There is nothing in the whole context of the Act to show that Congress had any intention of doing other than adopting the settled construction.

However, in the case of *Continental Casualty Co. v. Lawson,* 2 Fed. Sup. 459, Ritter, District Judge of the District Court for the Southern District of Florida, adopted a new and entirely revolutionary interpretation of the phrase. The case arose upon an applica-

tion for an interlocutory injunction staying the payment of the award pending final decision.

The showing of irreparable damage was that the claimant was profligate, wasted his earnings, drank intoxicating liquors to excess, was impecunious, and that his character and financial condition were such that no recovery probably could ever be had from him in the event the compensation order should be set aside in whole or in part. In denying the application the court said:

> "The purpose of the law is where the compensation award may be too heavy for the employer as a self-insurer to pay without practically taking all his property or rendering him incapable of carrying on his business, or where, by reason of age, sickness or other circumstances, a condition is created which would amount to irreparable injury."

It is submitted that taking the Compensation Act by its four corners, it is impossible to find in it any justification for the arbitrary construction of the phrase "irreparable damage" made by Judge Ritter.

He does not deny that the showing made was a classical showing of irreparable damage. He says, in effect, that there is no such thing as irreparable damage except in the case of a self-insurer who would, to all intents and purposes, be practically ruined by payments made under an invalid award which could not be recovered when the invalidity was established. He therefore says that the interlocutory injunction is in practice limited to the case of what is practically a marginal or financially weak self-insurer.

Not only is there no warrant for this construction in the Act of Congress, but it amounts to a gross discrimination against the maritime employer who has secured the payment of compensation by insurance and the adequately financed self-insurer. Irreparable damage is, therefore, made to depend not upon the financial irresponsibility of the claimant, but that of the self-insured employer. The test is no longer inability of a defendant to repay. The determining factor is the self-employer's ability to "take it". If he won't miss the money that he is compelled to pay out unjustifiably, he is forthwith precluded from showing any irreparable damage and obtaining any interlocutory relief.

This case went to the Circuit Court of Appeals for the Fifth Circuit, in *Continental Casualty Co. v. Lawson,* 64 Fed. (2d) 802, and was there reversed but on entirely different grounds, and there was no discussion in the appellate court of the construction of irreparable damage.

As far as we know, the only other case dealing directly with the question of the propriety of issuing an interlocutory injunction pending final decision is the case of *Northwestern Stevedoring Co. v. Marshall,* 41 Fed. (2d) 28, decided by this court May 19, 1930. There is, however, in the case, no discussion of what is necessary to be shown to constitute irreparable damage. The other points discussed in this case have since been decided by the Supreme Court of the United States in *Crowell v. Benson,* 285 U. S. 22, 76 L. Ed. 598, which is now the controlling authority on these

matters. Unfortunately, however, there is in *Crowell v. Benson, supra,* no discussion of the construction of the phrase "irreparable damage". It is quite evident that the District Court adopted the rule laid down by Judge Ritter in *Continental Casualty Co. v. Lawson, supra.* This court found (R. 26), that the allegations of paragraph XVI of the verified complaint (R. 10), do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, *and for that reason* denied the interlocutory injunction. The question whether this ruling is correct is the sole question presented by this record and its importance is the justification for this appeal.

At the present time the verified complaint is pending in the District Court upon a motion to dismiss which will be argued in the very near future. The decision on this motion will doubtless result in another appeal to this court in which, of course, error could be predicated upon the denial of the interlocutory injunction, but in the appeal on the merits that point would merely be one of several and it was thought that this interlocutory appeal should be taken in such manner as to bring before the court the single question of what is or is not irreparable damage.

3. APPELLANT'S SHOWING OF IRREPARABLE DAMAGE WAS CLASSICAL AND AN INTERLOCUTORY INJUNCTION SHOULD HAVE ISSUED IN THE COURT BELOW.

Under the terms of the Longshoremen and Harbor Workers' Compensation Act (33 *U.S.C.A.* Sec. 921), payments under the award must be made regardless of its validity and the jurisdiction of the Deputy Commissioner unless they are stayed by interlocutory injunction. This particular case involved the payment of $522.00 immediately as of May 1, 1937, the immediate payment of $200.00 for burial expense, and continuing payments of $9.00 a week payable in installments each two weeks or monthly, at the election of the respondents Howland. (R. 8, 9.) A total of $722.00, plus the continuing payments, is to be paid at once. In addition to that, penalties can, and we have been advised by respondent Pillsbury that they will, be assessed under the provisions of 33 *U.S.C.A.* Sec. 914.

On the application for the interlocutory injunction in the District Court, a showing was made that if the money was paid out to the respondents Howland, it could never, because of their financial irresponsibility and lack of means to repay, be recovered from them if the award should ultimately be held invalid.

The injunction proceedings were instituted for the purpose of reviewing respondent Pillsbury's award and determining whether or not the deceased Howland was, at the time of his death, a member of the crew of the "Moore No. 2". If he was a member of that crew, respondent Pillsbury had absolutely no jurisdiction to make the award because, as we have already

mentioned, members of a crew are specifically excepted from the operation of the Act. (33 *U.S.C.A.* Sec. 903-(a)-1.) In instituting the injunction proceedings, appellant was pursuing the only method of review provided by the statute (33 *U.S.C.A.* Sec. 921), and the only method by which it could protect itself from a substantial monetary loss if the award should be held to be invalid was by interlocutory injunction.

It now appears that if there is any way that it can be done, this appellant will be punished for its temerity in seeking to review the award made by respondent Pillsbury. Every effort will be made to assess and collect the penalties, and if appellant is compelled to make these payments before the merits of the litigation can be determined, they can never be recovered. If the award is held to be invalid on final decree, the defendants Howland will simply have been given the money of appellant without any justification. We do not believe that such administration of the Act was ever contemplated by Congress when the Act was passed. If such is the necessary construction of the Act, is not the Act itself unconstitutional in so far as any provision is concerned which is construed in such fashion as to take appellant's money and give it to the respondents Howland when they are no more entitled to it than a complete stranger to the appellant? We have not stressed the constitutional aspect because we cannot believe that this court will so construe the pertinent sections of the Longshoremen and Harbor Workers' Act as to produce such a result, but if such is the necessary construction of the Act, then we affirm

that it is unconstitutional in that respect in that it violates the Fifth Amendment to the Constitution of the United States.

VII.

CONCLUSION.

The application for the interlocutory injunction was made upon the basis of a verified complaint challenging the jurisdiction and power of the respondent Pillsbury to make any award whatsoever. This verified complaint contained allegations of irreparable damage in strictly classic form and these allegations were admitted by the return of the respondent Pillsbury. It is respectfully submitted that the interlocutory injunction should have been granted by the District Court and that its order denying the same should be reversed.

Dated, San Francisco,
September 8, 1937.

Respectfully submitted,
EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Appellant.

(Appendix Follows.)

Appendix.

Appendix

33 *U.S.C.A.* Sec. 921—Review of compensation orders.

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by refer-

ence thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter. (Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436.)

* * * * * * *

28 *U.S.C.A.* Sec. 227 (Judicial Code, section 129, amended). Appeals in proceedings for injunctions and receivers.

Where, upon a hearing in the district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an inter-

locutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal. (Mar. 3, 1891, c. 517, Sec. 7, 26 Stat. 828; Feb. 18, 1895, c. 96, 28 Stat. 666; June 6, 1900, c. 803, 31 Stat. 660; Apr. 14, 1906, c. 1627, 34 Stat. 116; Mar. 3, 1911, c. 231, Sec. 129, 36 Stat. 1134; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937.)

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Appellees.

BRIEF FOR APPELLEE, WARREN H. PILLSBURY.

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BRIEF FOR APPELLEE, WARREN H. PILLSBURY.

RESTATEMENT OF THE CASE.

We believe that appellant's statement of the case goes beyond the issues involved in this appeal. To restate the case concisely, it appears that on February 26, 1937, appellees Margaret and Kenneth Howland, dependent widow and minor child, respectively, of appellant's deceased employee (hereinafter called "claimants"), filed their claim for compensation with the United States Employees Compensation Commission. Thereafter, and subsequent to proper notice and hear-

ings on said claim, appellee Pillsbury, as deputy commissioner, under the Longshoremen's and Harbor Workers' Compensation Act (33 USC 901 et seq.), awarded compensation to claimants.[1]

Appellant then instituted proceedings in the court below to suspend and set aside said award, contending, in Paragraph XVI of the complaint only, that a temporary injunction was necessary to prevent irreparable damage.[2] Claimants and appellee Pillsbury were then directed to appear and show cause why, pending the final determination of the proceedings, the award should not be temporarily suspended and set aside and appellant be relieved temporarily from complying with the terms of the award.[3]

A return to the order to show cause was then filed stating that allegations similar to those contained in Paragraph XVI of the complaint, namely, that the financial irresponsibility of claimants and their inability to respond to any judgment that appellant might recover against them for payments made under the award in the event that said award was eventually suspended and set aside, do not constitute irreparable damage so as to entitle appellant to apply for and receive a temporary injunction.[4]

On June 10, 1937, after argument upon the allegations of Paragraph XVI only, the order to show cause was dismissed and the application for temporary injunction denied.[5] It is from this order and finding

1. Paragraph VIII of Appellant's Complaint; transcript of record, p. 5.
2. Transcript of record, p. 10.
3. Transcript of record, p. 22.
4. Transcript of record, p. 24.
5. Transcript of record, p. 25.

that the allegations of Paragraph XVI do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen's Act (33 USC 921), that appellants are appealing to this court.[6]

The first two of appellant's assignment of errors[7] may be combined into one question, namely, does claimants' financial irresponsibility, plus the fact that they are now judgment-proof constitute a sufficient showing so that the trial court may be held to have abused or improvidently exercised its discretion in denying appellant's application for temporary restraining order under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 921 (b))?

By the third assignment of error, appellant contends that the lower court erred in exercising its discretion in denying the application for a temporary restraining order thereby subjecting appellant to the alleged punitive provisions of Section 14 (f) of said Act (33 USC 914 (f)). The novelty of this argument, although striking, is no longer effective. This court, in a similar case, has joined with the Circuit Court of Appeals for the Second Circuit and definitely ruled that the provisions of that Section 14 (f) are valid to impose additional compensation for unauthorized delay in the payment of compensation previously awarded.

Arrow Stevedore Co. v. Pillsbury (February 15, 1937), 88 F. (2d) 446 (CCA-9);
Candado Stevedoring Corporation v. Lowe, 85 F. (2d) 119 (CCA-2).

6. Transcript of record, p. 27.
7. Transcript of record, p. 29.

The foregoing cases also require the employer to continue the payment of compensation as awarded while litigation is pending before the District Court, subject to paying twenty per cent additional compensation under Section 14(f) for unauthorized failure to do so.

ARGUMENT.

THE DENIAL OF INTERLOCUTORY INJUNCTIONS IN THESE CASES IS STARE DECISIS.

The order of the lower court, denying appellant's application for a temporary restraining order, should be affirmed in accordance with the rule expressed by the Supreme Court, speaking through Justice Sutherland, in Alabama v. United States, 279 US 229, at pages 230, et seq.:

> "It is well-established doctrine that an application for interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. (Citing authorities.) * * * The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

Equally venerated along with the so-called settled meaning and construction of the phrase "irreparable damage" which appellant desires this court to apply to Section 21 (b) of the Longshoremen's Act, this rule as expressed by Justice Sutherland, has long been applied

by three-judge federal courts in cases involving attempts to enjoin the enforcement of orders of various commissions, both state and federal, similar to the United States Employees Compensation Commission.

Cambridge Electric Light Co. v. Atwill, 25 F. (2d) 485, 486, et seq. (D. C. Mass.);

Albee Godfrey Whale Creek Co. v. Perkins, 6 F. Supp. 409, 411 (N. Y.—Opinion by L. Hand, J.);

Koppers Gas & Coke Co. v. U. S., 11 F. Supp. 467, 469 (Minn.);

Henderson Co. v. Thompson, 12 F. Supp. 519, 521 (Tex.).

In failing to recognize the distinction between applying the rule followed in the above cited cases to this case and not being able to apply the same to other authorities cited by appellant, in contending that the distinction between applications for interlocutory injunctions as compared to final decrees is entirely immaterial,[8] appellant has unquestionably weakened his contention that the lower court erred in exercising its discretion to deny appellant's application for an interlocutory injunction.

In this connection, may it be argued that the discretion of the lower court was improvidently exercised or abused in denying appellant's application to enjoin an order of the United States Employees Compensation Commission awarding compensation to claimants? Emphatically, no! Section 21 (b) of the Longshore-

8. Brief for appellant, pp. 10, 11.

men's and Harbor Workers' Compensation Act (33 USC 921 (b)) provides in part:

> "The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer."

To determine whether or not the lower court abused or exercised its discretion improvidently in denying appellant's application for temporary restraining order under Section 21 (b), this court must first decide whether or not the lower court could have specifically found that irreparable damage would, upon denial of such application, ensue to appellant as the employer of claimants' deceased husband and father, because Section 21 (b) goes on to provide:

> "The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

From the limited showing made in the allegations of the application contained in Paragraph XVI of the complaint, the court below, sitting in equity, was powerless to specifically find that irreparable damage, specifying the nature of the same, would ensue to appellant without inequitably and unjustly abusing

its discretion simultaneously to claimant's irreparable damage in not having immediate possession of the compensation awarded and, no doubt, sorely needed, although still withheld. The lower court had no alternative but to deny appellant's application in accordance with a rule already adopted by this court in Brehme v. Watson, 67 F. (2d) 359, where, speaking through Judge Garrecht, it was said on page 361 that:

> "If the facts conclusively show that it would be inequitable and unjust to award a restraining order, the court has no discretion in the matter but must refuse it."

Inability of the lower court in this case to satisfy the requirements of Section 21 (b) from the sketchy showing made by appellant, deprived that court of discretion. The denial of appellant's application was, therefore, equitable and just under the circumstances. As emphasized by the late Justice Holmes in Mass. State Grange v. Benton, 272 US 525, at pages 527, et seq., irreparable damage is synonymous with great injury to the person alleged to be damaged and although power exists in the federal courts to temporarily enjoin injurious acts of lesser magnitude such decrees, even though valid, are nevertheless erronous and subject to reversal.

As already stated, appellant, as plaintiff below, necessarily rested its application for interlocutory injunction upon the allegations of paragraph XVI of its complaint, which reads as follows:

> "That neither said award, nor any part thereof, has as yet been paid by plaintiff and unless pay-

> ment of the amounts required by the said award shall be stayed pending final decision in this suit, plaintiff will be required to pay under the terms of said award, large amounts of money, and in the event that final decision of this suit should be that the said award is void and of no effect, plaintiff will be unable to recover payments made under said award for the reason that defendants, Margaret Howland and Kenneth Howland, are financially irresponsible and have insufficient means to respond to any judgment which plaintiff might recover against them, to plaintiff's great and irreparable damage."

In other words, the only irreparable damage which appellant claimed is based on successive contingencies. If the compensation pending final hearing was paid as awarded and if the award was subsequently set aside, appellant would be precluded from recovering the same if claimants at some indefinite future date were, in fact, judgment proof. This claim, contingent as we say upon hypothetical circumstances without regarding the possibility of claimants' future ability to respond to a judgment, has, in so far as the same may be proof of irreparable damage, been consistently repudiated by the federal courts as wholly inequitable and unjust.

Judge Ritter, whom appellant is inclined to condemn for adopting a reasonable interpretation of the phrase "irreparable damage", as used in Section 21(b),[9] speaking for the District Court of Florida in Continental Casualty Co. v. Lawson (1932), 2 F.

9. Brief for appellant, pp. 12-14.

Supp. 459 (reversed on other grounds, 64 F. (2d) 802), said, at page 460:

> "The petition alleges that Roberts is insolvent, is profligate, wastes his earnings and drinks intoxicating liquors to excess, and the evidence submitted is that the employee is impecunious, and his character and financial condition are such that no recovery probably can ever be had from him in the event the compensation order of the commissioner is set aside in whole or in part. Such a condition, it is asserted, is sufficient to meet the irreparable injury to the employer contemplated by the act. I do not think this is the meaning of the section under consideration. *If such were its intent, it would be in only a few instances where an injunction would be refused.* The purpose of the law is that where the compensation award may be too heavy for the employer, as a self-insurer, to pay without practically taking all his property or rendering him incapable of carrying on his business, or where, by reason of age, sickness, or other circumstances, a condition is created which would amount to irreparable injury."[10]

Contrary to appellant's statement,[11] the reason for the rule adopted by Judge Ritter, as hereinabove italicized, could not upon proper application grossly discriminate against the employer who has secured the payment of compensation by insurance and the adequately financial self-insurer. Each must pay an award of compensation when properly ordered to do so, in liquidation of an equal responsibility demanded of each

10. Italics ours.
11. Brief for appellant, p. 14.

of them in Section 32 (a) of the Longshoremen's Act (33 USC 932 (a). Furthermore no distinction in kind is made as to this responsibility between self-insurers and insurance companies since Section 2 (5) of the same Act defines both to be "carriers". There is absolutely no claim or showing that appellant, a self-insurer, has been rendered incapable of carrying on business or was, or is financially burdened in any manner by the award to claimants beyond that pledged under Section 32 (a) of the Act, so as to deprive appellant of any of its property other than that already held for payment under Section 32 (a).

In fact if appellant is properly financed as a self-insurer pursuant to Section 32 of the Longshoremen's Act, and no showing has been made to the contrary, the payment of award to claimants would not possibly mean a real loss to appellant, let alone rendering appellant incapable of carrying on its business or causing an uncontemplated financial burden.

In Robins Dry Dock & Repair Co. v. Locke, 1933 A. M. C. 467, the United States District Court for the Eastern District of New York, after quoting from Section 21 (b), said:

> "This the plaintiff has not shown, as it is not sufficient to show, even, that the plaintiff would, because of the financial condition of the one to whom the award was directed to be paid, be unable to recover the amount paid if successful; but plaintiff under the law was bound to show a damage which the plaintiff will not be able to stand, and there is no such showing of any such facts. Steamship Terminal Operating Corpora-

tion v. Jerome G. Locke, U. S. D. C. S. D. N. Y., Equity 45-303, unreported opinion of Judge Knox, dated April 24, 1930; Lumber Mutual Casualty Co. v. Locke, Equity No. 53-327, U. S. D. C. S. D. N. Y., unreported opinion of Judge Woolsey, dated June 17, 1930; Globe Indemnity Co. v. Locke, Equity No. 5352, U. S. D. C. E. D. N. Y., unreported opinion of Judge Inch, dated January 9, 1931; Travelers Insurance Co. v. Locke, Equity No. 5103, U. S. D. C. E. D. N. Y., unreported opinion of Judge Byers, dated May 25, 1930; Candado Stevedoring Corp. v. Locke, Equity 5503, U. S. D. C. E. D. N. Y., unreported opinion of Judge Inch, dated July 2, 1931; M. P. Smith & Sons Co., Inc. v. Clark, et al, 1932 A. M. C. 143, Equity 5585 (E. D. N. Y.), opinion of Judge Campbell.

Motion for an interlocutory injunction denied."

A recent decision within the ninth circuit rendered by Judge Bowen, speaking for the District Court of Washington, in Paramino Lumber Co. v. Marshall (1937), 18 F. Supp. 645, 647, reiterated judicial disapproval of appellant's showing, properly found to be inadequate by the lower court.

"No equity jurisdiction to proceed for injunctive relief appears except that dependent upon alleged irreparable injury consisting of prospective costs, insolvency of claimant, and unconstitutionality of the statute * * * Such alleged irreparable damages have been by the following authorities held not sufficient to make out a case of equity jurisdiction for the injunctive relief prayed for. (Citing authorities including *Continental Casualty Co. v. Lawson,* supra, and *North-*

western Stevedoring Co. v. Marshall, 41 F. (2d) 28, (CCA-9).[12]

* * * * * * *

"Let an order be presented vacating the restraining orders, denying injunctive relief, and dismissing the action."

It is clear that even the alleged unconstitutionality of the Act at which appellant grasps on in the last line of its argument[13] cannot now be properly urged as grounds for a temporary restraining order.

Although this court, speaking through the late Judge Kerrigan, did not seem to expressly rule in its opinion on the exact question now presented by appellant's first two assignments of error, an inspection of the transcript of record in that case on file in this court, discloses that the rule as hereinabove set forth and as contended for by Appellee Pillsbury must have been applied by the court in Northwestern Stevedoring Co. v. Marshall (1930), 41 F. (2d) 28. This is further indicated by Judge Bowen's citation of the opinion as authority on this point. It also is apparent from the obvious inference to be drawn from the language of the case where it was stated at page 29:

"The bill filed by appellants sought an interlocutory injunction and set forth the insolvency of Matheson and the impossibility of recovering back payments made to him under the award of the deputy commissioner pending determination of the case, in the event that the award should be

12. Parentheses ours.
13. Brief for Appellant, p. 18.

set aside or modified, as the irreparable injury claimed. * * *

"After hearing, the District Court entered its order denying appellant's application for an interlocutory injunction, and it is from this order that this appeal is taken. * * *

"* * * appellants invoked the equity jurisdiction of the court. They are therefore subject to the usual rules under which injunctive relief is granted. It is well settled that the granting of a preliminary injunction rests in the sound discretion of the trial court, and that, while it is not necessary that the court, before granting such injunction, be satisfied that the plaintiff will certainly prevail upon the final hearing of the cause, it is necessary that the showing made be sufficient to establish at least the possibility that the plaintiff may make out a case upon the merits. * * *

"Affirmed."

The transcript of record filed in the *Northwestern* case discloses that the application for an interlocutory injunction to stay payment of compensation pending final decision in the case was made on the ground that irreparable damage would otherwise ensue to applicants. This application was supported by an affidavit of the "carrier" which reads in part as follows:

"That the defendant, Martin Matheson, is insolvent, and if an interlocutory injunction is not issued herein staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have

> to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant Martin Matheson, and said complainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage."

After hearing, District Judge Cushman denied the application for interlocutory injunction, applicant duly excepting thereto. This order was the sole error assigned on appeal, apparently being urged on the theory that claimant was insolvent and, therefore, any payments made under the award, pending final decision on the merits if eventually favorable to the applicants, could not be recovered from Matheson to the irreparable damage of the "carrier".

The above mentioned application, affidavit, order and single assignment of error must have been clearly before this court when it rendered its opinion, quoted from above, affirming Judge Cushman's order. We respectfully submit that the previous decision of this court in Northwestern Stevedoring Co. v. Marshall, supra, is *stare decisis* in the case at bar on the errors assigned by appellant.

Such a result is consistent with the intent of the Longshoremen's Act purposely designed to afford quick redress to the injured employee, his widow, or other surviving dependents. Its administration is committed to the Commission and its deputies. Section 21 (b) is intended to safeguard and preserve to the beneficiaries of the law the immediate relief ad-

ministratively ordered. It is well known that the vast majority, in fact practically all, of those workers for whose relief the Longshoremen's Act was passed, are without property and would be unable subsequently to return the weekly compensation payments made thereunder for the reason that the relatively small sum of money awarded as compensation must be necessarily expended as it is received in providing the necessities of life.

The law clearly recognizes the existence of this condition and Section 21 (b) is obviously intended to protect and aid in the payment of the compensation awarded to continue the existence, during disability, of the injured employee and his dependents thus provided for. If the employer could secure a stay of payments pending final decision by merely showing the inability of claimant to return the money, the employer could in almost every case temporarily cut off this necessary relief for which the Act provides. Doubtless, the law, carefully providing that stay of payment should not be allowed except upon the clear showing coupled with a judicial determination that *"irreparable damage"* would ensue to the employer, must have contemplated some other consequence to the employer, apart from the mere inability of an employer to collect back from one of its injured employees, or his dependents, such weekly compensation payments as might have been made under a compensation order pending final action by the court. Appellant's contention would be applicable in practically every case and thus the provision for speedy relief would be rendered of no effect and meaningless.

The decisions we have cited, rejecting appellant's contention, find further approval in the dictum of the Supreme Court, speaking through Chief Justice Hughes, in Crowell v. Benson, 285 U. S. 22, at page 44:

> "Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence showing that the employer would otherwise suffer irreparable damage. § 21 (b)."

In the final analysis appellant's entire argument rests upon two underlying fallacies. First, appellant apparently assumes that an appealing litigant has a natural and constitutional right in the federal courts to an automatic stay of execution upon taking an appeal, at least if he provides proper security for eventual payment of the award and costs. This assumption is necessarily predicated upon a second fallacious assumption that the right to an appeal is necessarily a natural and constitutional right also which must in all cases be supported, to be effective, by an automatic stay of execution until the matter can be determined by the highest court to which counsel may succeed in taking the case.

Both assumptions are generally erroneous. The right to a stay of execution pending appeal, as well as the right to an appeal in any case, is statutory and not a constitutional or natural right and can be modified, limited or abolished by Congress, and even may be taken away by the legislative body in its discretion.

Lott v. Pitman, 243 U. S. 588, 591;
Frank v. Mangum, 237 U. S. 309.

Therefore, since Congress unquestionably intended in Section 21 (b) of the Longshoremen's Act to provide that the execution of an award of compensation under said Act should not be stayed automatically pending an appeal, but only by injunction where a clear showing is made that "irreparable damage" would ensue to the employer, generally speaking an automatic stay of execution upon the institution of a proceeding for review of an award in the District Court is not possible. Only where a temporary injunction is properly applied for and granted pursuant to Section 21 (b) may compliance with the award be temporarily withheld.

CONCLUSION.

That claimants are financially irresponsible and have insufficient means now to respond to any judgment which appellant might recover against them is entirely indefinite and does not constitute a showing that appellant did, or would suffer irreparable damage because of the lower court denying its application for a temporary restraining order. On the contrary, appellant's showing deprived the lower court of discretion, requiring a denial of such application forthwith.

Assuming, however, that the lower court retained discretion to act on appellant's showing, the order denying the application was not an abuse of, or improvident exercise of discretion because no irreparable

damage existed and no specific finding of the same or the nature thereof could be made.

Dated, San Francisco,
October 6, 1937.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

S. P. MURMAN,
Assistant United States Attorney,

Attorneys for Appellee,
Warren H. Pillsbury.

No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE DRYDOCK COMPANY (a corporation),
Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor),
Appellees.

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellees.

REPLY BRIEF FOR APPELLANT.

A perusal of the brief for appellee, Warren H. Pillsbury, filed herein, necessitates a reply which, however, will be exceedingly short.

I.

INTRODUCTION.

On page 3 of the brief for said appellee, the effect of the first two assignments of error has been fairly and accurately stated. The third assignment, however, has

been dismissed with a cavalier statement that this court, in a similar case (*Arrow Stevedoring Co. v. Pillsbury,* 88 Fed. (2d) 446), has joined with the Circuit Court of Appeals for the Second Circuit and definitely ruled that the provisions of Section 14(f) are valid to impose additional compensation for unauthorized delay in the payment of compensation previously awarded.

We have never questioned the soundness of this ruling but we have said that the fact that these penalties will be assessed is but further evidence showing an abuse of discretion on the part of the trial court in denying the interlocutory injunction.

Furthermore, the *Arrow* case, supra, is not a similar case because in that case the original jurisdiction of the Deputy Commissioner was not questioned, as it is here. Neither was there any attack upon the jurisdiction of the Deputy Commissioner in the case of *Candado Stevedoring Co. v. Lowe,* 85 Fed. (2d) 119.

II.

REPLY TO ARGUMENT.

There is no doubt that the granting or denying of an interlocutory injunction is addressed to the discretion of the trial court. The purpose of this appeal, however, is to review that discretion for the reason that it is our opinion that it has been abused.

Appellee, on pages 4 and 5 of his brief, attempts to show that the settled construction of the phrase "irrep-

arable damage", adopted by the Federal Courts in three-judge cases involving attempts to enjoin the enforcement of orders of various commissions, is equally applicable in suits seeking to review orders of the United States Employees' Compensation Commission. The analogy is fallacious in the extreme and the cases cited do not support appellee's contention, for in none of them was there present any element of insolvency or inability to repay awards made under an order which might subsequently be judged void.

In *Cambridge Electric Light Co. v. Atwill,* 25 Fed. (2d) 485, there was an effort to obtain a temporary injunction in a suit in equity brought against the public utilities department of Massachusetts to enjoin an order requiring the plaintiff to make material reductions in its rate for domestic and commercial lighting. In this case there was conflicting evidence and the loss, if any, claimed by the plaintiff, was speculative in the extreme. The holding of the court was that governmental acts within the power of a state are presumed valid and should not be interfered with by the federal court upon a mere balance of possible injuries. In the case at bar it is a conceded fact that if appellant is forced to pay the award under review, and that award should ultimately be determined to be void, appellant would never be able to recover from appellees Howland any of the payments because of their financial irresponsibility and inability to repay.

The case of *Albee Godfrey Whale Creek Co. v. Perkins,* 6 Fed. Sup. 409, is even less in point, for in this case the interlocutory injunction was denied in a

suit which had for its original purpose a proceeding to enjoin any hearing at all by the State Industrial Board of New York. In this case it was said by the court "that the danger is as yet speculative and the time has not come to fend against it."

In the case at bar the danger is not speculative, the award has already been made and additional penalties for nonpayment have been assessed.

Koppers Gas & Coke Co. v. United States, 11 Fed. Sup. 467, was a proceeding by a shipper to enjoin an order of the Interstate Commerce Commission requiring carriers to cease making certain allowances to shippers. Application for temporary injunction was denied upon the ground that even if the order were ultimately enjoined, the shipper would at most have lost allowances during the period of suit, an entirely different situation from that which prevails here.

In *Henderson Co. v. Thompson,* 12 Fed. Sup. 519, there was a suit to enjoin an order of the Texas Railroad Commission limiting the use of plaintiff's gas wells. A preliminary injunction was denied upon the ground that the order deprived the plaintiff of nothing at all but merely postponed its enjoyment of it if the order should prove to be invalid.

The foregoing cases are found on page 5 of appellee's brief.

It is said by appellee that "if the facts conclusively show that it would be inequitable and unjust to award a restraining order, the court has no discretion in the matter and must refuse it", citing in support of this

statement the case of *Brehme v. Watson,* 67 Fed. (2d) 359, a decision rendered by this court. It is unfortunate that counsel did not also cite the sentence which directly follows the above quotation. That sentence is pertinent to an understanding of the opinion. It reads as follows:

> "Such order will not be granted when good conscience does not require it; where it will operate oppressively or contrary to justice; where it is not reasonable and equitable under the circumstances of the case." (Page 361.)

Furthermore, it appears in this case that the petition of appellee for an order restraining appellant contained no allegation that such an order was necessary to prevent threatened or imminent harm or damage or that any act of appellant in connection with state court actions instituted by appellee would in any wise interfere with or prevent the due administration of the bankruptcy court.

Notwithstanding the assertion of appellee's brief to the contrary, the whole doctrine that insolvency or inability to repay sums paid under a void award rests in the ill-considered decision of Judge Ritter in *Continental Casualty Co. v. Lawson,* 2 Fed. Sup. 459. Every case cited in appellee's brief on this point stems in that case and all we have is a collection of parrot-like reiteration of Judge Ritter's language.

It is said on page 9 of appellee's brief that the rule adopted by Judge Ritter cannot discriminate against the employer who has secured the payment of com-

pensation by insurance and the adequately financed self-insurer in favor of the marginal self-insurer. This is scarcely a realistic statement. If the marginal self-insurer, whose business would be wrecked by an interim payment of an award which he could not recover if the order upon which it is based should prove to be invalid, can obtain a preliminary injunction, the fact that the adequately financed self-insurer, or one who has secured compensation by insurance cannot under similar circumstances obtain a preliminary injunction, shows there is discrimination. This discrimination inevitably flows from the rule propounded by Judge Ritter.

An effort is made on pages 12, 13 and 14 of appellee's brief to show that *Northwestern Stevedoring Co. v. Marshall,* 41 Fed. (2d) 28, is *stare decisis* on the errors alleged by appellant. This case merely decides that if the plaintiff could not succeed on the allegations of his bill on the merits, there could be no abuse of discretion in denying the interlocutory injunction even though the showing of irreparable damage was adequate. There, as here, the showing was substantially the insolvency of the employee. There is no word in the decision in support of any contention that the showing was inadequate and the question has never been determined by this court. The *Marshall* case was decided on the merits and as the plaintiff failed on the merits, there was clearly no abuse of discretion in denying the interlocutory injunction.

In every case where a temporary injunction has been denied, the plaintiff has ultimately failed in his

attack upon the validity of the order under review. Consequently, in no case yet reported could it fairly be said that there was any abuse of discretion in denying the interlocutory injunction. If the plaintiff cannot prevail upon the merits, he certainly is not entitled to provisional relief. Furthermore, in none of the reported cases has there been an attack upon the essential basic jurisdiction of the Deputy Commissioner. That is the basis of the attack here. To say that one who is forced in the interim to pay an award subsequently held invalid when he cannot possibly recover back the payment, does not suffer irreparable damage, is merely to close one's eyes to the facts and to the settled construction of the phrase.

Judge Ritter attempts to justify his decision upon the ground that Congress did not mean to adopt the settled construction of irreparable damage. Nevertheless the words are in the statute, they had a settled construction at the time the statute was adopted, and apart from the imaginings of Judge Ritter, there is no evidence that Congress ever intended to do anything but adopt the settled construction.

On page 16 of appellee's brief there is a feeble effort to rely upon the case of *Crowell v. Benson,* 285 U. S. 22 at p. 44, and certain direct quotation is put into the mouth of Chief Justice Hughes as if the quotation represented his attitude on the question. The fact is that the Chief Justice was merely summarizing the provisions of the statute and not expressing his view upon what does or does not constitute irreparable damage.

CONCLUSION.

In conclusion, it is respectfully submitted that the order of the District Court should be reversed.

Dated, San Francisco,
October 15, 1937.

Respectfully submitted,
EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Appellant.

No. 8606

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FRANCIS NEYLAN,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 40--8-25-37

No. 8606

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FRANCIS NEYLAN,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 60--8-25-37

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

J. PAUL MILLER, Esq.,
for Taxpayer.

O. W. SWECKER, Esq.,
for Comm'r.

Docket No. 82451

JOHN FRANCIS NEYLAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1935

Dec. 16—Petition received and filed. Taxpayer notified. (Fee paid)

" 16—Copy of petition served on General Counsel.

1936

Jan. 21—Answer filed by General Counsel.

" 23—Copy of answer served on taxpayer.

May 8—Hearing set week of 7/6/36, at San Francisco, Calif.

July 6—Hearing had before Mr. Smith. Submitted on merits. Stipulation as to facts filed. Pet's brief due 8/5/36. Respondent's due 9/5/36. Reply due 9/20/36.

" 31—Transcript of hearing of 7/6/36 filed.

1936

Aug. 4—Motion for 30 day extension to file brief, filed by taxpayer. Granted to 9/4/36.

Sept. 4—Brief filed by taxpayer.

" 4—Motion for extension of 30 days to file additional supplementary brief filed by taxpayer.

" 4—Order granting motion for additional supplementary brief to Oct. 4, 1936, entered.

" 4—Copy of brief served on General Counsel.

" 5—Copy of order and motion served.

Oct. 19—Motion for leave to file supplemental brief filed by taxpayer, 10/19/36 Granted.

" 19—Supplemental brief filed by taxpayer.

" 20—Copy of motion and supplemental brief served on General Counsel.

1937

Jan. 18—Memorandum opinion rendered, Mr. C. P. Smith, Div. 5. Judgment of no deficiency will be entered.

" 18—Decision entered, Mr. Chas. P. Smith, Div. 5.

Apr. 13—Petition for review by United States Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

" 21—Proof of service filed by General Counsel.

June 1—Motion for extension to July 12, 1937 to complete and transmit record filed by General Counsel.

" 1—Order enlarging time to July 12, 1937 to complete and transmit record, entered.

1937

July 7—Praecipe filed—proof of service thereon.

" 12—Order enlarging time to July 31, 1937, to transmit and deliver record, entered. [1*]

United States Board of Tax Appeals

Docket No. 82451

JOHN FRANCIS NEYLAN,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:E-1, dated September 20, 1935, and as a basis of his proceeding, alleges as follows:

(1) The Petitioner is an individual with his residence at 198 Mountain Home Road, Woodside, California.

(2) The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit "A" was mailed to the Petitioner on the 20th day of September, 1935.

(3) The taxes in controversy are income taxes for the calendar year 1931, and in the sum of $5,613.99.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

(4) The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in increasing the ordinary net income reported in the taxpayer's return from $81,488.30 to $127,881.09, and in treating this sum as ordinary income, [2] exclusive of capital net loss.

(b) The Commissioner erred in disallowing the sum of $46,392.79 as an ordinary loss, resulting in an increase of ordinary net income as reported in the return, from $81,488.30 to $127,881.09.

(c) The Commissioner erred in computing a surtax on the sum of $127,881.09, instead of on the sum of $81,488.30, as set forth in taxpayer's return.

(d) The Commissioner erred in determining that the amount of Petitioner's income subject to the normal tax for the year 1931 was and is the sum of $110,375.02, and in determining that a normal tax in the sum of $5,298.75 is due thereon.

(e) The Commissioner erred in computing a normal tax at the rate of 5% on the sum of $102,375.02, and in determining a tax thereon in the sum of $5,118.75, instead of computing said tax at the rate of 5% on the sum of $55,982.23, resulting in a tax of $2,799.11.

(f) The Commissioner erred in fixing and determining a total tax liability due from said Petitioner for the year 1931 in the sum of

$15,159.35 instead of the sum of $9,545.36 as set forth in the taxpayer's return.

(g) The Commissioner erred in determining that a deficiency is due in the sum of $5,613.99, or in any sum.

(h) The Commissioner erred in allowing but 12½% of the alleged capital net loss of $54,657.60, as a deduction, [3] which 12½% amounts to $6,832.07, instead of allowing 12½% of the capital net loss of $8,263.81, and allowing as an ordinary loss the sum of $46,392.79, all as reported in Petitioner's income tax return for the calendar year 1931.

(i) The Commisioner erred in failing to allow as a deduction and as an ordinary loss the sum of $46,392.79, by reason of the fact said loss actually occurred through the sale of stocks as hereinafter set forth, which were held by taxpayer for a period less than two years; said refusal to allow said sum as a deduction, and as an ordinary loss results in and will constitute

(1) The taking of Petitioner's private property for public use without just or any compensation;

(2) The taking of Petitioner's property without due process of law;

all in violation of the provisions of the Constitution of the United States of America and the amendments thereto.

(5) The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

The taxpayer bought and sold on the dates as hereinafter set forth, certain stocks and securities as follows: [4]

		Date Acquired	Date Sold	Amount Received	Cost	Loss
200	Atlas Diesel B	1/15/29	12/23/31	$ 188.00	$ 8,804.80	$
200	Atlas Diesel B	12/24/31	12/24/31	188.00	228.00	8,656.80
200	Interstate Eq. Preferred	9/23/29	12/23/31	1,957.00	9,600.00	
200	Interstate Eq. Preferred	12/24/31	12/24/31	1,957.00	2,085.00	7,771.00
500	Interstate Eq. Common	10/ 7/29	12/23/31	215.00	8,875.00	
500	Interstate Eq. Common	12/24/31	12/24/31	215.00	327.50	8,772.50
1,000	National Auto Fibre A	9/14/28	12/23/31 12/24/31	229.30) 585.00)	21,876.79	
1,000	National Auto Fibre A	12/24/31	12/24/31	800.00	930.00	21,192.49
	Total					$46,392.79

As a result of such purchases and sales as hereinabove set forth, the taxpayer suffered an actual loss for the year 1931 in the sum of $46,392.79, which taxpayer reported as an ordinary loss for the year in question.

It is the contention of the taxpayer that said sum was properly taken as an ordinary loss, and was property deducted from his income for the year in question, and the Commissioner has erred in treating said sum as a capital net loss as set forth in the ninety-day letter dated September 20, 1935.

Wherefore, Petitioner prays after Answer filed on behalf of the Respondent, said matter may be set down for hearing in accordance with the law, and that upon a hearing [5] thereof, this Board determine there is no deficiency due from the Petitioner for the calendar year 1931. Taxpayer prays the Board may grant such other and further relief as may be meet and proper in the premises.

J. PAUL MILLER
Counsel for Petitioner,
No. 1 Montgomery Street,
San Francisco, California. [6]

State of California
City and County of San Francisco

John Francis Neylan, being first duly sworn, deposes and says:

He is the Petitioner above named; that he has read the foregoing Petition; and is familiar with the statements contained therein, and the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN FRANCIS NEYLAN

Subscribed and sworn to before me this 12 day of December, 1935.

[Seal] LULU A. GODSIL
Notary Public in and for the City & County of San Francisco, State of California.

Commission expires September 13, 1939. [7]

1050M EXHIBIT "A"

TREASURY DEPARTMENT
Washington
Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer To

Sep. 20, 1935

Mr. John Francis Neylan,
Crocker First National Bank Building,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the year 1931, discloses a deficiency of $5,613.99 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a lgal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the

closing of your return(x) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By /sg/ CHAS. T. RUSSELL
Deputy Commisioner

Enclosures:
Statement
Form 870 [8]

STATEMENT

IT:AR:E-1
MKR-90D

In re: Mr. John Francis Neylan
Crocker First National Bank Building
San Francisco, California
Income Tax Liability

Year—1931
Income Tax Liability—$15,159.35
Income Tax Assessed—$9,545.36
Deficiency—$5,613.99

Reference is made to a letter dated August 14, 1935 from your attorney, Mr. J. Paul Miller, in which it is stated that you do not desire to file a protest with the Bureau against the deficiency set for the in Bureau letter dated January 5, 1935. This letter of final determination is therefore being issued.

It is noted that you sold the following stocks which had been held over two years and on the same day or the following day repurchased substantially identical stocks and sold such stocks on the day repurchased:

200 Atlas Diesel B
200 Interstate Equities Preferred
500 Interstate Equities Common
1,000 National Auto Fibre A

The loss of $46,392.79 resulting from these transactions was reported as an ordinary loss.

The loss on the first sale is not allowable in accordance with section 118 of the Revenue Act of 1928. The loss on the second sale you claimed as an ordinary loss.

Income Tax Ruling 2832 published in Internal Revenue Bulletin December 3, 1934 which modified Income Tax Ruling 2443, Cumulative Bulletin VII-2, 1927 holds as follows:

> "In the case of 'wash sales' the two-year period during which property must be held to constitute 'Capital Assets' within the meaning of section 101 of the Revenue Acts of 1928 and the corresponding provisions of prior Revenue acts runs from the date of the acquisition of the original securities and not from the date of repurchase." [9]

Article 602 of Regulations 74 provides that the basis of stock acquired in "wash sales" shall be the same as the basis of the stock or securities so sold or disposed of, increased in the amount of any excess of the repurchase price over the sale price or decreased by the amount by which the sale price exceeds the repurchase price as the case may be.

	Date Acquired	Sold Date	Amount Received	Cost	Basis for Second Sale	Loss on Second Sale
					$	$
200 Atlas Diesel B	1/15/29	12/23/31	$ 188.00	$8,804.80		
200 Atlas Diesel B	12/24/31	12/24/31	188.00	228.00	8,844.80	8,656.80
200 Interstate Eq. Preferred	9/23/29	12/23/31	1,957.00	9,600.00		
200 Interstate Eq. Preferred	12/24/31	12/24/31	1,957.00	2,085.00	9,728.00	7,771.00
500 Interstate Eq. Common	10/ 7/29	12/23/31	215.00	8,875.00		
500 Interstate Eq. Common	12/24/31	12/24/31	215.00	327.50	8,987.50	8,772.50
1,000 National Auto Fibre A	9/14/28	12/23/31	229.30)	21,876.79		
		12/24/31	585.00)			
1,000 National Auto Fibre A	12/24/31	12/24/31	800.00	930.00	21,992.49	21,192.49
Total						$46,392.79

A synopsis of your adjusted income follows:

Ordinary net income reported on return	$81,488.30
Add back:	
Loss on stocks held to be a capital net loss	46,392.79
Ordinary income exclusive of capital net loss	$127,881.09
Capital net loss reported	$ 8,263.81
Add:	
Capital net loss shown above	46,392.79
Adjusted capital net loss	$54,656.60

[10]

Computation of Tax

Ordinary net income adjusted	$127,881.09
Less:	
Dividends	17,506.07
Balance subject to normal tax	$110,375.02
Normal tax at 1½% on $4,000.00	$ 60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $102,375.02	5,118.75
Surtax on $127,881.09	17,236.22
Total	$ 22,534.97
Less:	
12½% of capital net Loss of $54,656.60	6,832.07
Difference	$ 15,702.90

Less:		
Earned income credit	$540.00	
Tax paid at source	3.55	543.55
Tax liability		$ 15,159.35
Tax previously assessed		9,545.36
Deficiency		$ 5,613.99

A copy of this communication is being mailed to your representative Mr. J. Paul Miller, One Montgomery Street, San Francisco, California, in accordance with the authority conferred in the power of attorney executed by you and on file with the Bureau.

[Endorsed]: U. S. B. T. A. Filed Dec. 16, 1935.

[11]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) and (2). Admits the allegations of paragraphs (1) and (2) of the petition.

(3). Admits that the taxes in controversy are income taxes for the calendar year 1931, but denies the remaining allegations of paragraph (3) of the petition.

(4) (a) to (i), inclusive. Denies the allegations of error contained in paragraphs (4) (a) to (i), inclusive, of the petition.

there is no deficiency in petitioner's income tax for that year.

In his deficiency notice the respondent has held that the loss on the first sale, that of December 23, 1931, was not allowable in accordance with section 118 of the Revenue Act of 1928, and that the loss on the second sale, that of December 24, 1931, was a capital loss and not an ordinary loss, under Income Tax Ruling (I. T.) 2832, Cumulative Bulletin XIII-2, page 201.

The identical question here in dispute was fully discussed in Howard Heinz, 34 B. T. A. 885, where we held, favorably to the petitioner's contention in this proceeding, that a loss resulting from the sale of securities under facts substantially the same as those obtaining here was an ordinary loss and not a capital net loss. That case was followed in Wadsworth R. Lewis, 34 B. T. A. 996. Upon authority of those cases it is held that the loss sustained by the petitioner in the amount of $46,392.79 was an ordinary loss and is so deductible in his income tax return.

Judgment of no deficiency will be entered.

Entered Jan. 18, 1937. **[15]**

United States Board of Tax Appeals
Washington

Docket No. 82451.

JOHN FRANCIS NEYLAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered January 18, 1937, it is

Ordered and decided: That there is no deficiency for the year 1931.

[Seal] (Signed) CHARLES P. SMITH
Member.

Entered Jan. 18, 1937. [16]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Charles P. Reilly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office under and by virtue of the laws of the United States.

[17]

The respondent on review (hereinafter referred to as the taxpayer) is an individual with his residence in Woodside, California.

The return of the taxpayer for the calendar year 1931 was made to the Collector of Internal Revenue at San Francisco, California, whose office is located in the judicial district of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

NATURE OF CONTROVERSY

On September 20, 1935, the Commissioner, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1928, (45 Stat. 852), as amended by Sec. 501 of the Revenue Act of 1934 (48 Stat. 755), forwarded to the taxpayer, by registered mail, a notice of deficiency, wherein the taxpayer was notified of his, the Commissioner's determination of a deficiency of $5,613.99 in the taxpayer's income tax liability for the year 1931.

Thereafter, on December 16, 1935, the taxpayer filed a petition with the United States Board of Tax Appeals for a redetermination of the proposed

deficiency in his income tax liability for the year 1931, as shown by the notice of deficiency dated September 20, 1935, as aforesaid, which petition was assigned docket number 82,451. On January 21, 1936, the Commisioner filed with the Board of Tax Appeals his answer to the petition so filed by the taxpayer. The proceeding came on for hearing before a Division of the Board of Tax Appeals, sitting at San Francisco, [18] California, on July 6, 1936. The only issue involved was:

> Where, during the year 1931, the taxpayer sold certain shares of corporate stocks at a loss, which shares, on the dates of the sales thereof, had been held by him for more than two years; and where, within less than thirty days after the dates of such sales the taxpayer purchased a like number of shares of the same stocks; and where, shortly thereafter, and during the same taxable year, the latter shares were sold, does the loss sustained by the taxpayer, computed under section 113 (a) (11) of the Revenue Act of 1928, (45 Stat. 818), constitute an ordinary loss allowable as a deduction under Section 23 (e) (2) of that Act (45 Stat. 800)?

On December 23, 1931, the taxpayer sold a number of shares of several different blocks of stock which he had owned for more than two years. The shares sold, the date of acquisition by the taxpayer, the cost to him, and the selling price, were as follows:

Shares Sold	Date Acquired	Cost	Selling Price
200 shares Atlas Diesel B	Jan. 15, 1929	$8,804.80	$ 188.00
200 shares Interstate Equities, Preferred	Sept. 23, 1929	9,600.00	1,957.00
500 shares Interstate Equities, Common	Oct. 7, 1929	8,875.00	215.00
1000 shares National Auto Fibre A	Sept. 14, 1928	21,876.70	814.30
Totals		$49,156.59	$3,174.30

[19]

On December 24, 1931, the day following the sale of the above shares, the taxpayer purchased a like number of the same shares and later during that day sold the shares so purchased. The cost and selling price of those shares were as follows:

Shares Sold	Cost	Selling Price
200 shares Atlas Diesel B	$ 228.00	$ 188.00
200 shares Interstate Equities, Preferred	2,085.00	1,957.00
500 shares Interstate Equities, Common	327.50	215.00
1000 shares National Auto Fibre A	930.00	800.00
Totals	$3,570.50	$3,160.00

As a result of the several transactions outlined above the taxpayer was actually out of pocket the net amount of $46,392.79. He claimed that amount as an ordinary loss in his income tax return for 1931.

In the deficiency notice the Commissioner disallowed the aforesaid loss as an ordinary loss but allowed the same as a capital net loss in accordance with Section 101 (c) (2) of the Revenue Act of 1928 (45 Stat. 811) and computed the tax liability accordingly.

On January 19, 1937, the Board of Tax Appeals promulgated its report (memorandum opinion) in this proceeding, wherein it was held that the loss

sustained by the taxpayer as a result of the sales of the shares of stocks during the year 1931, as aforesaid, constitutes an ordinary loss, allowable as a deduction under Section 23 (e) (2) of the Revenue Act of 1928, (43 Stat. 800). On January 18, 1937, the Board entered its decision in this proceeding, wherein it was ordered, adjudged and decided that, in accordance with its memorandum opinion, [20] there is no deficiency due from the taxpayer for the year 1931.

III.

ASSIGNMENTS OF ERROR

That the said Commissioner, being aggrieved by the opinion and decision of the United States Board of Tax Appeals desires a review thereof, in accordance with the statutes in such cases made and provided, by the United States Circuit Court of Appeals for the Ninth Circuit in which power of such review is vested, and as reasons for such review he alleges that the Board in rendering its opinion and in entering its decision committed the following errors:

(1) The Board erred in holding and deciding that the taxpayer sustained an ordinary loss during the year 1931.

(2) The Board erred in not holding and deciding that the taxpayer did not sustain an ordinary loss during the year 1931.

(3) The Board erred in holding and deciding that the taxpayer did not sustain a capital loss during the year 1931.

(4) The Board erred in not holding and deciding that the taxpayer sustained a capital loss during the year 1931.

(5) The Board erred in holding and deciding that the transactions by which the taxpayer sold and/or disposed of 200 shares of Atlas Diesesl B, 200 shares of Interstate Equities, Preferred, 500 shares of Interstate Equities, Common, and 1000 shares of National Auto Fibre A, during the year 1931, resulted in a loss deductible as and for an ordinary loss.

(6) The Board erred in not holding and deciding that the transactions by which the taxpayer sold and/or disposed of 200 shares of Atlas Diesel B, 200 shares of Inetrstate Equities, Preferred, 500 shares of Interstate Equities, Common, and 1000 shares of National Auto Fibre A, during the year 1931, resulted in a loss, deductible as and for a capital loss. [21]

(7) The Board erred in not finding that the loss of $46,392.79 sustained by the taxpayer during the year 1931, resulted from the sale by him during that year of capital assets, within the meaning of Section 101 (e) (8) of the Revenue Act of 1928, (45 Stat. 811).

(8) The Board erred in ordering, adjudging and deciding that there is no deficiency due from the taxpayer for the year 1931.

(9) The Board erred in not ordering, adjudging and deciding that there is a deficiency due from the taxpayer for the year 1931 in the amount of $5,613.99.

(10) The Board erred in entering judgment in favor of the taxpayer.

(11) The Board erred in not entering judgment in favor of the Commissioner.

Wherefore, the Commissioner petitions that the opinion and decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

JAMES W. MORRIS
Assistant Attorney General.
(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.
CHARLES P. RIELLY
Special Attorney, Bureau of Internal Revenue.

[22]

United States of America
District of Columbia—ss.

Charles P. Reilly, being duly sworn, says that he is a Special Attorney of the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own

knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

CHARLES P. REILLY

Sworn and subscribed to before me this 13th day of April, 1937.

GEORGE W. KRIES
Notary Public.

My commission expires November 16, 1937.

[Endorsed]: U. S. B. T. A. Filed Apr. 13, 1937.

[23]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To:

Mr. John Francis Neylan.
198 Mountain Home Road.
Woodside, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of April, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for

review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of April, 1937.

(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 16th day of April, 1937.

JOHN FRANCIS NEYLAN
Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Apr. 21, 1937.

[24]

[Title of Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between parties hereto, by their respective attorneys of record, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

(1) That the petitioner, John Francis Neylan, is an individual with his residence at 198 Mountain Home Road, Woodside, California.

(2) That the Notice of Deficiency herein was mailed by the Commissioner of Internal Revenue

chased the said 500 shares of Interstate Equities Common, for the sum of $8,875.00; that petitioner sold these 500 shares on December 23, 1931, for the sum of $215.00; that on December 24, 1931, petitioner purchased 500 shares of Interstate Equities, Common, for the sum of $327.50, and thereafter and on said December 24, 1931, sold said 500 shares for the sum of $215.00; that petitioner's actual out of pocket loss as a result of these transactions was and is the sum of $8,772.50.

(d) That on September 14, 1928, the petitioner purchased the said 1,000 shares of National Auto Fibre A for the sum of $21,876.79; that petitioner sold these 1,000 shares on December 23, 1931 and December 24, 1931 for the sum of $814.30; that thereafter and on [27] December 24, 1931, petitioner purchased 1,000 shares of National Auto Fibre A for the sum of $930.00, and thereafter and on said December 24, 1931, sold said 1,000 shares for the sum of $800.00; that petitioner's actual out of pocket loss, as a result of these transactions was and is the sum of $21,192.49.

(e) That petitioner's actual out of pocket loss, as a result of all of the transactions set forth in the aforesaid paragraphs was and is the sum of $46,392.79.

(f) That all purchases and sales referred to in the foregoing paragraphs were made in the open market and at the current market prices.

(10) (a) That the petitioner deducted the aforesaid loss of $46,392.79 as an ordinary loss in his Income Tax Return filed for the year 1931.

(b) That in the audit of said Return the Respondent disallowed the aforesaid loss as an ordinary loss, but allowed the same as a capital net loss.

(11) It is further stipulated that if the action of the petitioner in claiming the loss of $46,392.79 as an ordinary loss was correct, there is no deficiency due from the petitioner for the year 1931 and the Board may enter an Order to that effect, but if the loss was a capital net loss, the Board may enter an Order fixing the deficiency in the sum of $5,-613.99, together with interest thereon as required by law.

Dated: June 24, 1936.

J. PAUL MILLER,
Attorney for Petitioner.

HERMAN OLIPHANT OWS
General Counsel for the Department of the Treasury.
Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed at hearing July 6, 1936. [28]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records

in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.
   (a) Petition, including annexed copy of notice of deficiency.
   (b) Answer.
3. Memorandum opinion of the Board.
4. Decision of the Board.
5. Petition for review, together with proofs of service of notices of filing petition for review and of service of copies of petition for review.
6. Stipulation of facts filed at hearing before the Board. [29]
7. This praecipe.

(Signed) MORRISON SHAFROTH
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 7th day of June, 1937.

(Signed) J. PAUL MILLER,
Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed July 7, 1937. [30]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax

Appeals, do hereby certify that the foregoing pages, 1 to 30, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 17th day of July, 1937.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 8606. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. John Francis Neylan, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 21, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8606

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN FRANCIS NEYLAN, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

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QUESTION PRESENTED

Where the taxpayer in 1931 sold at a loss shares of stock which had been held by him for more than two years, and within less than thirty days thereafter repurchased an identical number of shares of the same stock, and on the same day of such repurchase sold all of the shares, is the loss sustained by the taxpayer deductible as a capital net loss or as an ordinary loss?

STATUTES INVOLVED

The statutes involved herein will be found in the Appendix, *infra,* pp. 18–20.

STATEMENT

The facts, as developed by a stipulation between the parties (R. 25–29), may be stated briefly as follows:

On December 23, 1931, the taxpayer sold a number of shares of several different blocks of stock which he had owned for more than two years. The shares sold, the date of acquisition by the taxpayer, the cost to him, and the selling price, were as follows (R. 15):

Shares sold	Date acquired	Cost	Selling price
200 Atlas Diesel B	1/15/29	$8,804.80	$188.00
200 Interstate Equities, Preferred	9/23/29	9,600.00	1,957.00
500 Interstate Equities, Common	10/7/29	8,875.00	215.00
1,000 National Auto Fibre A	9/14/28	21,876.79	814.30
Totals		$49,156.59	$3,174.30

On December 24, 1931, the day following the sale of the above shares, the taxpayer purchased a like number of the same shares and later during that day sold the shares so purchased. The cost and selling price of those shares were as follows (R. 15):

Shares sold	Cost	Selling price
200 Atlas Diesel B	$228.00	$188.00
200 Interstate Equities, Preferred	2,085.00	1,957.00
500 Interstate Equities, Common	327.50	215.00
1,000 National Auto Fibre A	930.00	800.00
Totals	$3,570.50	$3,160.00

As a result of the several transactions outlined above, the taxpayer was actually out of pocket the net amount of $46,392.79. He claimed that amount as an ordinary loss in his income tax return for 1931, and it is expressly stipulated (R. 29) that if the loss claimed is allowable, there is no deficiency in his income tax for that year.

In his deficiency notice (R. 10), the Commissioner held that the loss on the first sale, that of December 23, 1931, was not allowable in accordance with Section 118 of the Revenue Act of 1928, and that the loss on the second sale, that of December 24, 1931, was a capital loss and not an ordinary loss.

The Board of Tax Appeals (R. 16) held that the loss sustained by the taxpayer in the amount of $46,392.79 was an ordinary loss and was so deductible in his income tax return.

SPECIFICATION OF ERRORS TO BE URGED

Stated briefly, the Commissioner urges that the Board erred in not holding that the loss of $46,392.79 sustained by the taxpayer during the year 1931 was a capital net loss and was deductible as such. The Commissioner's assignments of error, all of which are relied upon, are stated in full at pages 21, 22, and 23 of the Record.

SUMMARY OF ARGUMENT

The "wash sale" provision of the statute (Section 118 of the Revenue Act of 1928, *infra*), precluded the deduction of the loss sustained by the taxpayers upon the first sale of the stock, because it was followed by a repurchase within a period of thirty days. In such case, the statute provides that the basis of the new stock remains the same as the basis of the original stock. Section 113 (a)(11) of the Revenue Act of 1928, *infra*. Since, for the purpose of determining the base, the holding of the original stock and of the repurchased stock are treated as one, the two holdings should also be treated as one, and added together, for the purpose of determining the period for which the stock shall be deemed to have been held in applying the capital assets provision of the statute, Section 101 (c)(8) of the Revenue Act of 1928, *infra*. *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455. The tacking together of the two holdings for the purpose of the rate, as well as for the purpose of the base, is required for harmony and consistency. The intent

of the statute is clearly to treat the stock acquired on the repurchase as taking the place of the original stock, and that intent should be given effect for the purpose of fixing the rate as well as the base, although the statute does not make an express provision to that effect with reference to the rate. Neither the legislative history nor the executive interpretation are such as to compel this Court to adopt a contrary interpretation. When Congress did put in an express provision to apply to the fixing of the rate in the 1932 Act, it was clarifying and not changing the law.

ARGUMENT

Where the taxpayer in 1931 sold at a loss certain stock which had been held by him for more than two years, and within less than thirty days later repurchased the same number of shares of the same stock, which he sold on the same day, the loss is deductible as a capital net loss

In deciding this case, the Board followed its decision in the case of *Heinz* v. *Commissioner,* 34 B. T. A. 885, where it passed upon this question for the first time. The *Heinz* case is now pending on appeal in the Circuit Court of Appeals for the Third Circuit. The *Heinz* case was also followed by the Board in deciding the cases of *Cary* v. *Commissioner,* unpublished, decided August 18, 1936, affirmed *per curiam,* without opinion, by the Circuit Court of Appeals for the Second Circuit on June 28, 1937; *Peck* v. *Commissioner,* decided September 30, 1936, and affirmed by the Circuit Court of Ap-

peals for the Second Circuit on June 28, 1937; and *Lewis* v. *Commissioner,* 34 B. T. A. 996, pending on appeal in the Circuit Court of Appeals for the Second Circuit.

In the *Heinz* case, the question was fully discussed by the Board in a majority opinion, and the contrary view discussed in a dissenting opinion, while in the other cases, the Board's opinion consisted of a simple statement to the effect that it was following the *Heinz* case.

A similar question is also involved in *Augustus* v. *Moore,* not officially reported, but found in 1937 CCH, Vol. 4, ¶9400, in which the District Court for the Northern District of Ohio held in favor of the Government on June 12, 1937. In that case, the court said:

> The purpose of the "wash sale" provision of the Revenue Act was to invalidate deductions claimed for losses on securities repurchased within thirty days before or after their sale. The clear intendment of such action by the Congress compels, as it seems to me, the treating of the new stock acquired as taking the place of the original shares. There is nothing binding in the earlier interpretations of statutes by the Commissioner, and even if the Commissioner had otherwise interpreted the law, it would not foreclose judicial construction.
>
> In each of the stock transactions, it is clear that the obvious purpose was to transmute what would have been a capital loss

> into an ordinary loss by executing a sale, repurchase and resale, all within a thirty-day period. To put it plainly, the favorable change in deductible loss was attempted to be accomplished by the use of a "wash sale." The legislative purpose was to treat the stock repurchased as the stock originally held, where it was substantially identical (here, it was identical in character and number of shares). Such sale and repurchase, from a taxation standpoint, left the holdings as they originally stood. This being so, a capital loss resulted from the final sale occuring more than two years after the original purchase.

Because of the taxpayer's subsequent repurchase within a period of thirty days, his loss on the first sale was not deductible under the wash sale provision of the statute, Section 118 of the Revenue Act of 1928, *infra.* The statute further provides, in Section 113 (a) (11), *infra,* that the basis for the stock acquired in the repurchase shall be the same as the basis of the stock originally held, with a certain adjustment not here material. Because of these statutory provisions, the Commissioner here treated the shares sold on the second sale as if they had been held for more than two years, as in fact the original stock had been held, and treated the loss from their sale as a capital net loss.

The position of the Commissioner is that, since the statute provides that the basis for the stock acquired on the repurchase remains the same as the

basis of the original stock which had been disposed of in the wash sale, the stock acquired on the repurchase shall be treated as the stock originally held for the purpose, also, of determining the period for which it shall be deemed to have been held in applying the capital assets provision of the statute, Section 101 (c) (8), *infra*. If the holdings of the original stock and of the repurchased stock are treated as one for the purpose of fixing the basis, they should likewise be treated as one, and added together, for determining the period for which the stock has been held.

This consistent treatment of the new stock, as taking the place of the stock originally held, is required in order to give effect to the statute. Section 113 (a) (11), which in the case of shares bought after a wash sale substitutes the basis of the original shares for the basis of the new shares, is a definite indication of a statutory intent to treat the new shares as taking the place of the old shares. That intent should be given effect, we submit, not only for the purpose of fixing the base, but also for the purpose of determining the period of holding by the taxpayer, in applying Section 101 (c) (8). The two holdings are treated together for the purpose of fixing the base, and they should also be treated together for the purpose of fixing the rate. *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455. The same treatment for the two purposes is impelled, we submit, by all concepts of harmony and con-

sistency. We recognize that, as stated by the Board in its opinion in the *Heinz* case, 34 B. T. A. 885, 887, this treatment is not expressly required by a literal reading of the statute, but we submit that it is required to promote the intent of the statute and required by dictates of logic and harmony. As indicated by Section 113 (a) (11), the intent and meaning of the statute with regard to the whole subject matter of "wash sale" transactions and their consequences are clear. The statute clearly means that the original stock and the new stock are to be treated as the same, and that meaning, which is expressly stated with respect to the base, should be given effect also with respect to the rate. *Helvering* v. *N. Y. Trust Co., supra.*

In the *N. Y. Trust Co.* case, it was held that, since the donee must take the donor's base, he is entitled to tack his holding to that of his donor in order to determine the period of holding for the purpose of applying the capital assets provision of the statute. The Court said (p. 467): "* * * the continuity required to be used to get the base was also intended for use in finding the rate." In order to give effect to the intent of the statute, a continuity of holding should be found to have existed here, despite the intervening wash sale, just as in the *N. Y. Trust Co.* case it was found to exist despite a change in the legal identity of the holder.

The result of the decision of the Board, however, is to treat the two holdings together to arrive at the

base, but to separate them to arrive at the tax rate. The majority opinion of the Board in the *Heinz* case refused to follow the *N. Y. Trust Co.* case, making some attempt at distinguishing it and at pointing out its inapplicability to the present question (pp. 893–896). The Board there said (p. 895) that the change in the capital gain provision from the original enactment as Section 206 of the 1921 Act, where its application was limited only to gains, to the later Revenue Acts, where it was made applicable to both gains and losses (Sections 208 of the Revenue Acts of 1924 and 1926, and Section 101 (c) (8) of the Revenue Act of 1928), takes away much of the compelling force from the principle of conforming the rate to the base. We submit that that change does not diminish the soundness or force of the principle of conformity which was adopted both by this Court and by the Supreme Court in the *N. Y. Trust Co.* case. The Board also attempted (p. 896) to distinguish the *N. Y. Trust Co.* case on the ground that there "the same specific property" was held throughout, while in this situation the original property had been sold and new property had taken its place. We submit that that attempted distinction is wholly without merit, because of the intent of the statute to treat the new stock as taking the place of the old. As pointed out by the dissenting opinion in the *Heinz* case (p. 901), there is even more reason here for requiring conformity for both the purpose of the rate and

the base than there was in the *N. Y. Trust Co.* case, because here we are dealing at all times with the same taxpayer. The Board in the *Heinz* opinion, in rejecting the doctrine of the *N. Y. Trust Co.* case, also relied upon *McFeely* v. *Commissioner,* 296 U. S. 102. We submit that the decision in the *McFeely* case is not really opposed to our position in this case. Although there the Supreme Court did not follow the rule of conformity of treatment for the purpose of rate and base, it is clear that it did not do so in order to reach a more equitable result in that case, and that the Court did not in any way disturb the doctrine of conformity which it had established in the *N. Y. Trust Co.* case.

The Board in the majority opinion in the *Heinz* case (p. 889), in refusing to give effect to the intent of the statute, pointed out that the "base" provision in the first statutory enactment with reference to "wash sales", Section 202 (d) (3) of the Revenue Act of 1921 (which is a prototype of Section 113 (a) (11) of the 1928 Act), was limited "for the purposes of this section" to the base to be used, and that that limitation "negates" any broader implication which might be drawn from Congressional reports that the new property is to take the place of the original property. But the "base" provision in the 1928 Act, Section 113 (a) (11), is not so restricted by the words "for the purpose of this section" as was its prototype, and therefore the broader implication arising from the

other provisions of the statute is not "negated" in the 1928 Act, as the Board felt it to be in the 1921 Act.

In arriving at its conclusion upon this question, the majority opinion in the *Heinz* case relied (pp. 890–893) not only upon the legislative history of the capital gain provision of the statute, pointing out the change, which has already been mentioned, from the original enactment in 1921 to the later Acts so as to apply to both capital gains and capital losses, but also relied upon the prior administrative interpretation of the statute. After referring to G. C. M. 1210, IV–2 Cumulative Bulletin 60; I. T. 2443, VII–2 Cumulative Bulletin 127, and I. T. 2576, XI Cumulative Bulletin 164, the Board concluded that "the unvarying practice" of the Government had been to treat the property sold on the second sale as a sale of property different from the original property and to regard the capital loss provision as inapplicable. The Board pointed out in the *Heinz* case (p. 893) that that practice was continued until the latter part of 1934, when in I. T. 2832, XIII–2 Cumulative Bulletin 201, the position was taken, modifying the earlier I. T. 2443, that the period of holding for the purpose of the capital assets provisions of the 1928 and earlier Acts runs from the date of acquisition of the original securities.

We submit that there is nothing of any binding character in the interpretation of the statutory

provisions given by the Commissioner in the earlier rulings. See *Helvering* v. *N. Y. Trust Co., supra,* p. 468. The cautionary notice published in the bulletins in which those rulings appear clearly points out that they do not commit the Treasury Department to any interpretation of the law. The taxpayer could not acquire any vested right by virtue of the earlier Departmental interpretation of the law. An erroneous interpretation of the law by the Treasury Department does not estop the Government from asserting the tax, even though a taxpayer may have relied on it. *Manhattan General E. Co.* v. *Commissioner,* 76 F. (2d) 892 (C. C. A. 2d), affirmed, 297 U. S. 129.

Not only is the prior erroneous departmental interpretation of the statute not binding on the Government, but also the courts are in no sense obligated to follow it. It is well established that the courts are not obligated to follow blindly even regulations or treasury decisions (which are of greater force than any of the rulings in I. T.'s or G. C. M.'s), but will follow them only to the extent that they correctly state the legal effect of a statute. *Manhattan General E. Co.* v. *Commissioner, supra.*

When, from the decision in the *N. Y. Trust Co.* case, it became apparent that the courts had not agreed with the Treasury Department on the interpretation which it gave to the statute in the earlier rulings, the Department changed its position and, in I. T. 2832, adopted an interpretation

in keeping with the decision of the Supreme Court on the subject. This the Department clearly had a right to do, and was not estopped from doing it by reason of its former interpretation. Under the Revenue Acts, it is recognized that the Commissioner can change or modify his position or his regulations to comply with the correct interpretation of the law, either as construed by the courts or as determined by him from experience or necessity. Section 1108 of the Revenue Act of 1926, as amended by Section 605 of the Revenue Act of 1928, and Section 506 of the Revenue Act of 1934. The right of the Commissioner to change his position, and even to make his change retroactive in application, has been upheld. *Manhattan General E. Co.* v. *Commissioner, supra.*

In arriving at its decision on this question, the majority opinion of the Board in the *Heinz* case also relied (34 B. T. A. 885, 897–899) upon its conclusions that Congress recognized that under the existing law (the 1928 Act) the new shares did not take the place of the old shares for the purpose of determining the period of holding, and that by the addition of subparagraph (D) to Section 101 (c) (8) in the 1932 Act, Congress made a deliberate change in the law. We submit that both of these conclusions are wrong. It is true, as the majority opinion pointed out, that in the report of the House Committee (H. Rep. No. 708, 72d Cong., 1st Sess., p. 16) the existing law is interpreted as providing

that for the purpose of determining the period of holding the holding of the original shares and of the repurchase shares are not to be tacked, and that the loss upon the sale of the new shares is deductible as an ordinary loss. However, as pointed out in the dissenting opinion in the *Heinz* case (34 B. T. A. 885, 901), the Senate Finance Committee had a different view as to the interpretation of the 1928 Act and as to the effect of adding subparagraph (D) to the 1932 Act. S. Rep. No. 665, 72d Cong., 1st Sess., pp. 22–23. The Senate Committee apparently thought that the new provision in the 1932 Act would be merely declaratory of the existing law—would be merely a clarification and not a change in the law. This conflict of views between the House and the Senate Committees as to the interpretation of the prior law makes the legislative interpretation thereof of little value in determining the correct interpretation of the prior law.

Moreover, "the courts alone may in the end declare what a statute means." *American Exchange Securities Corp.* v. *Helvering,* 74 F. (2d) 213, 214 (C. C. A. 2d). The determination of the construction of the meaning of the statute is a judicial function. *Walker* v. *United States,* 83 F. (2d) 103, 106 (C. C. A. 8th). This function is so entirely and purely judicial that it is beyond the power either of the executive (*Manhattan General E. Co.* v. *Commissioner, supra; Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757) or of Congress

(*Levindale Lead Co.* v. *Coleman,* 241 U. S. 432, 439) to control.

The addition of subparagraph (D) to Section 101 (c) (8) of the 1932 Act expressly put into the statute that which in effect was in the provisions of the prior law although not therein expressly stated, namely, that the property repurchased in connection with a wash sale takes the place of the original property for the purpose of the rate as well as the base. We submit that the addition of this express provision to the 1932 statute was not a change in the law as it theretofore existed, but simply a clarification of what may have been doubtful. *Helvering* v. *N. Y. Trust Co., supra,* p. 468.

It must be remembered that when Congress first enacted the wash sale provisions into law, in Section 214 (a) (5) of the 1921 Act, and reenacted it in the subsequent revenue acts, it did so for the obvious purpose of closing a gap and not for the purpose of opening a door to tax avoidance, such as is permitted by the decision of the Board below. By the employment of this device of the intermediate wash sale, the taxpayer is, nullifying the effect of the wash sale provision of the law, attempting to destroy the fact that his holding was one of capital assets, and he is attempting to escape the limitation on the deduction of his capital loss. He is attempting by this device of the intermediate wash sale to do indirectly what he could not do directly. See *Gregory* v. *Helvering,* 293 U. S. 465.

CONCLUSION

It is submitted that the decision of the Board is erroneous and contrary to the law, and should therefore be reversed.

Respectfully submitted.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

SEPTEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * *

(c) *Definitions.*—For the purposes of this title—

* * * * *

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property ex-

changed, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(11) WASH SALES OF STOCK.—If substantially identical property was acquired after December 31, 1920, in place of stock or securities which were sold or disposed of and in

respect of which loss was not allowed as a deduction under section 118 of this Act, or under section 214 (a) (5) or 234 (a) (4) of the Revenue Act of 1921, the Revenue Act of 1924, or the Revenue Act of 1926, the basis in the case of the property so acquired shall be the basis in the case of the stock or securities so sold or disposed of, except that if the repurchase price was in excess of the sale price such basis shall be increased in the amount of the difference, or if the repurchase price was less than the sale price such basis shall be decreased in the amount of the difference;

* * * * *

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

U. S. GOVERNMENT PRINTING OFFICE: 1937

No. 8606

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FRANCIS NEYLAN,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR RESPONDENT.

J. PAUL MILLER,
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BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the United States Board of Tax Appeals is unreported. It appears in the Record herein at pages 14-16. The decision of the Board was in favor of the respondent herein.

QUESTION PRESENTED.

Where the taxpayer in 1931 sold at a loss shares of stock which had been held by him for more than two years, and within less than thirty days thereafter repurchased an identical number of shares of the same stocks, and on the same day of such repurchase sold all of the shares, was he entitled to claim his actual loss as a

deduction from his income for the year 1931, or was he restricted to a deduction of but 12½% of his actual loss, as a "capital" loss.

STATUTES INVOLVED.

The Statutes, Regulations, Committee Reports, etc., involved herein will be found in the Appendix infra, pages 25-35.

STATEMENT.

We do not controvert petitioner's statement of the case. The facts were stipulated to. (R. 25-29.) For convenience, however, we repeat the essential facts.

In 1929 the respondent-taxpayer purchased certain stocks; in 1931 and more than two years thereafter, these stocks were sold.

The next day the same number of shares of the same stocks were purchased by respondent and later on the same day, were sold.

These transactions resulted in an actual loss to the taxpayer of $46,392.79. (R. 28.)

The respondent reported the loss of $46,392.79 as an ordinary loss in his 1931 return.

The Commissioner admits an actual out-of-pocket loss in the sum of $46,392.79, but contends that the respondent is entitled to but 12½% thereof as a "capital" loss; we contend on the other hand, that under the language of the applicable Statute, and under the ruling of the Commis-

sioner in effect at the time (I. T. 2443, infra p. 28) the entire loss is deductible as an "ordinary" loss.

SUMMARY OF ARGUMENT.

1. The respondent in claiming his loss as an ordinary loss, rather than reporting it as a capital loss, which was but 12½% of the actual loss, adopted the administrative practice which had been followed for years theretofore, as disclosed by a ruling of the Bureau of Internal Revenue.

This rule was justified as there was no correlation between the "wash sale" and the "capital gain and loss" provisions of the 1928 Act, or previous Acts.

2. *Helvering v. The New York Trust Co.,* 292 U. S. 455 (decided in May, 1934), relied upon by the Commissioner as justifying a departure from the previous administrative practice, is not in point.

McFeely v. Commissioner, 296 U. S. 102, shows that the decision in the *New York Trust Co.* case was based upon the peculiar circumstances of the latter case. The *McFeely* case further shows the disposition of the Supreme Court not to extend the rule of the *New York Trust Co.* case beyond its own particular facts.

3. Cases recently decided show that the original ruling of the Bureau of Internal Revenue, treating a loss of this character as an ordinary loss rather than as a capital loss, was correct.

4. The House and Senate Committee Reports on proposed changes in the 1932 Revenue Act show the procedure

adopted by the taxpayer herein was in accordance with the provisions of the 1928 Act, and that in order to change the prevailing rule, the 1932 Act had to be changed.

ARGUMENT.

1. THE TAXPAYER HEREIN FOLLOWED THE ADMINISTRATIVE PRACTICE PREVAILING IN 1931 AND PRIOR THERETO. THERE IS NO CORRELATION BETWEEN THE WASH SALE PROVISIONS AND THE CAPITAL GAIN AND LOSS PROVISIONS OF THE 1928 REVENUE ACT, OR PREVIOUS ACTS.

The respondent herein purchased certain stocks in 1929. More than two years later, in 1931, these stocks were sold; thereafter, and within thirty days from these sales, the respondent purchased the same number of shares of the same stocks. By reason of these repurchases, the taxpayer was unable to claim his loss occasioned by the original sales. (Section 118, Revenue Act of 1928, infra p. 27.) But the respondent on the same day of these latter purchases, sold the stocks so purchased. It is admitted that by reason of these transactions, the taxpayer suffered an actual out-of-pocket loss of $46,392.79. (R. 28.)

The Commissioner contends that by reason of the provisions of Section 113 (a) (11), of the 1928 Act (infra p. 26), which provides that the *basis* of stock acquired on the second purchase shall be the basis of the stock disposed of, the two holdings should also be treated as one, and added together, for the purpose of determining the *period* for which the stock shall be deemed to have been held in applying the capital assets provision of the Statute.

(Section 101 (c) (8) of the Revenue Act of 1928, infra p. 26.) (See Petitioner's Op. Br. p. 4.)

But the Commissioner completely ignores the fact that the 1928 Revenue Act specifically provides for treating the two holdings as one, for the purpose of determining the *base,* but is silent as to a similar treatment of the two holdings for the purpose of determining the *period,* which in turn determines the *rate.*

Section 118 of the 1928 Act provides that where a loss is claimed on the sale of stock, if within thirty days before or after the sale, the taxpayer has bought, or contracted to buy, substantially identical stock, the loss on that particular sale shall not be allowed.

Section 113 (a) (11) says that where substantially identical stock is acquired in place of the stock sold and in respect to which the loss is not allowable under Section 118, "the basis, in the case of property so acquired, shall be the basis in the case of stock or securities so sold or disposed of". (There are certain exceptions which are not applicable here.)

In other words, for the purpose of determining the *basis,* these two provisions of the Statute *must* be read together, simply because one section specifically refers to the other.

Section 101 (c) (2) of the 1928 Act (infra p. 25), says a capital loss means a deductible loss resulting from the sale of capital assets. A capital asset is defined in Section 101 (c) (8) (infra p. 26) as property held for more than two years. Admittedly the stocks sold on the final transaction were not held for two years, in fact they were sold on the same day as the purchases.

It would have been perfectly simple for Congress to have provided that in the event of a sale, a repurchase and a final sale, such as occurred here, the two holdings should be tacked together for the purpose of determining the rate. In fact, this in effect, was what was done in the 1932 Act. (Revenue Act of 1932, Section 101 (c) (8) (D), infra p. 27.)

The taxpayer in claiming the loss as an ordinary loss, was simply following the ruling of the Income Tax Unit of the Bureau of Internal Revenue as published in Cumulative Bulletin VII-2 (July-December 1928) p. 127, being I. T. 2443. (Infra p. 28.)

The administrative practice whereby a loss of the character involved herein was treated as an ordinary loss and not as a capital loss, was in effect for years prior to the filing of respondent's return for the year 1931, and remained in effect until the latter part of 1934. This was pointed out by the Board of Tax Appeals in the case of *Howard Heinz,* 34 B. T. A. 885, at 890-893. (This case is now on appeal to the Circuit Court of Appeals for the Third Circuit.) The *Heinz* case is on all fours with the instant case and was decided in favor of the taxpayer.

Referring to the administrative practice as evidenced by I. T. 2443, pettioner in his opening brief (p. 12) says:

> "We submit that there is nothing of any binding character in the interpretation of the statutory provisions given by the Commissioner in the earlier rulings. See *Helvering v. N. Y. Trust Co.,* supra, p. 468. The cautionary notice published in the bulletins in which those rulings appear clearly points out that they do not commit the Treasury Department to any interpretation of the law."

We do not contend, of course, that the Commissioner can issue a ruling which will foreclose the Courts from the judicial construction of a statute. We do contend, however, that any administrative practice followed by Government offices and officials over a period of years, is not to be lightly disregarded.

Commissioner's counsel seeks to escape the force of this long-established and unvarying practice, by reference to the "cautionary notice published in the Bulletins in which those rulings appear". (Petitioner's Op. Br. p. 13.)

This "cautionary notice" is found on the cover of C. B. VII-2, in which I. T. 2443 is found at page 127. It reads as follows:

> "SPECIAL ATTENTION is directed to the cautionary notice on this page that published rulings of the Bureau do not have the force and effect of Treasury Decisions *and that they are applicable only to facts presented in the published case.*" (Italics supplied.)

This is amplified as follows:

> "The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. *It is especially to be noted that the same result will not necessarily be reached in another case unless all the mate-*

> *rial facts are identical with those of the reported case.* As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case. * * *." (Italics supplied.)

Of course, it will not be disputed that the situation as disclosed in the instant case comes directly within the language of I. T. 2443.

The rule as announced in I. T. 2443, was and is amply justified, in view of the fact that there was no correlation between the wash sale provision and the capital gain and loss provision of the several Revenue Acts containing these provisions.

In connection therewith, the Board in the *Heinz* case stated (see 34 B. T. A. 889, note 5):

> "In both the Gregg 'Statement of the Changes Made in the Revenue Act of 1921 by H. R. 6715 and the reasons therefor,' and the Committee Reports, it is apparent that no thought was given to correlating the wash sale provision with the capital gain and loss provision. This is likewise true of the Committee reports upon the revenue bills of 1926 and 1928."

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2. THE DECISION IN HELVERING v. NEW YORK TRUST CO., DID NOT JUSTIFY THE COMMISSIONER IN DEPARTING FROM PREVIOUS ADMINISTRATIVE PRACTICE. McFEELY v. COMMISSIONER SHOWS THE SUPREME COURT REFUSED TO EXTEND THE DOCTRINE OF THE NEW YORK TRUST CO., CASE.

The Commissioner applied the rule as set forth in I. T. 2443, which rule the respondent followed in making his 1931 return, until the latter part of 1934, when in I. T.

2832, C. B. XIII-2, p. 201, infra p. 30, there was a "modification" of I. T. 2443 and it was ruled that the two year period of the capital assets section of the Revenue Act of 1928, and prior Acts, "runs from the date of acquisition of the original securities and not from the date of repurchase". (This "modification" is pointed out in the Board's opinion in the *Heinz* case, 34 B. T. A. at p. 893.)

In support of this entirely new ruling, the statement is made "See generally the reasoning contained in the decision of the U. S. Supreme Court in *Helvering v. New York Trust Co., Trustee,* 292 U. S. 455."

The essential facts in the *New York Trust Co.* case are briefly as follows:

A donor in 1921 conveyed certain securities to a trustee for the benefit of his, the donor's, son. The transfer was held to be a gift. The trustee sold the securities in 1922 (less than two years after the conveyance to the trustee). This resulted in a large profit based on the *cost* to the donor in 1906, which was the donor's *basis.*

The 1921 Revenue Act, which was applicable, provided that in the case of a *gift* of property, upon a sale of such property "the basis shall be the same as that which it would have had in the hands of the donor".

The 1921 Act also provided that property held for more than two years constituted capital assets and that the gain resulting from a sale of capital assets should be taxed at but 12½% (at option of the taxpayer) instead of at the ordinary rates.

The sale in question was made by the trustee *less* than two years after the conveyance to the trustee. (The con-

veyance took place in 1921; the sale took place in 1922.) As a result, the Commissioner contended that the property sold did not constitute "capital assets" and that the large gain resulting should be taxed at the ordinary rates.

The trustee in reporting the gain was *required* by law to use the donor's basis. This was the cost to the donor in 1906. The cost to the donor was roughly $141,000.00; the value at the time of the creation of the trust in 1921 was about $577,000.00; the sale in 1922 realized slightly over $603,000.00.

As a result there would have been an enormous tax on the large gain represented by the difference between the cost to the donor and the 1922 sale price, if the gain had been taxed at the ordinary rates. As pointed out, the trustee was *required* to take the *donor's* basis.

The question presented to the Supreme Court was whether or not on these facts the period of holding by the donor could be tacked onto the holding by the trustee for the purpose of bringing the holding within the capital asset provision of the 1921 Act. (Property held more than two years.)

The Court said (292 U. S. 467):

> "Here the taxable gain was ascertained by putting together the periods in which the shares were held by trustor and trustee respectively. The taxable gain was the same as if the former held continuously from the time of purchase in 1906 until the sale in 1922. But to ascertain the applicable rate the Commissioner broke the continuity. If the trustor had held until the sale, the 12½ per cent rate would have been applicable and the tax would have been substantially less than one-fourth of the amount assessed against the trustee

> who, for the purpose of calculating the gain, was substituted for the trustor."
>
> * * * * * * *
>
> "There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort."

It is submitted that the decision in this case is based upon its own peculiar facts and is not to be extended to a case where the facts are different, and is not controlling here.

The Commissioner in the *Heinz* case, supra, urged the *New York Trust Co.* case upon the Board as controlling. The Board rejected it and held it not applicable. See the Board's discussion of the *New York Trust Co.* case in 34 B. T. A. at 893, et seq.

(May we at this time point out an unintentional error, in referring to the *N. Y. Trust Co.* case, in Petitioner's Opening Brief, p. 10, which might prove confusing. The brief reads:

> "We submit that that change does not diminish the soundness or force of the principle of conformity which was adopted both by *this* Court and by the Supreme Court in the N. Y. Trust Co. case." (Italics supplied.)

In referring to "this Court", the writer of the brief is referring to the Circuit Court of Appeals for the *Ninth* Circuit. This is an error; the *New York Trust Co.* case was decided by the *Second* Circuit.)

McFeely v. Commissioner, 296 U. S. 102, 80 L. Ed. 83:

As indicating the intention of the Supreme Court to confine the rule announced in the *New York Trust Co.* case

to its own peculiar facts, see *McFeely v. Commissioner*, 296 U. S. 102. At page 105 the Court says:

> "These cases were brought here on writs of certiorari to resolve a conflict between Circuits with respect to the application of Sec. 101 of the Revenue Act of (May 29) 1928, which permits taxpayers, at their option, to pay at the rate of twelve and one-half per cent on capital net gains. Subsection (c) (8), so far as material, is: '"Capital assets" means property held by the taxpayer for more than two years * * *' Whether property acquired from a decedent through intestacy, or a general bequest, is, within the meaning of the clause, held by the taxpayer from the date of the decedent's death or from the date of distribution, is the matter in dispute."

And at page 110:

> "Counsel urge that Helvering v. New York Trust Co., 292 U. S. 455, 78 L. ed. 1361, 54 S. Ct. 806, supra, requires us to construe Sec. 101 (c) (8) as fixing the same date for the beginning of the holding period as Sec. 113 (a) (5) sets for determining the basis. We think, however, that the case is not authority here. The Act of 1921 exhibited an inconsistency in that while a donee was not permitted to tack his tenure to that of his donor, he was required to use his donor's basis. This inconsistency flowed from a literal reading of the separate sections dealing with these two subjects. Such a result the court held would run counter to the very policy and purpose of the capital gains rate reduction, which was to encourage sales of capital assets, and would penalize the taxpayer making such sales. The departure from the strict terms of the act was justified in order to secure him the benefit intended to be conferred. The court was care-

> ful to say 'The rule that where a statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one * * *' That rule was held inapplicable for the reasons stated.
>
> Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer. To depart from the literal meaning of Sec. 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

The Supreme Court in deciding the *McFeely* case, supra, also decided four additional cases involving the same point. Amongst them was *Isabel K. Dibblee v. Commissioner,* on writ of certiorari from the United States Circuit Court of Appeals for the *Ninth* Circuit, opinion reported in 75 Fed. (2d) 617. The decision of the Ninth Circuit was reversed.

Reverting to the *New York Trust Co.* case, may we point out that the decision in the Court below was by the Circuit Court of Appeals for the *Second* Circuit (68 Fed. (2d) 19), which decision was affirmed by the Supreme Court.

It is interesting to note that the following cases involving the precise point involved in the instant case, were decided by the Board of Tax Appeals:

Guy Cary v. Commissioner, unreported; Memorandum Opinion—August 18, 1936;

Estate of Clara S. Peck, et al. v. Commissioner, unreported; Memorandum Opinion—August 18, 1936,

and were later appealed to the *Second* Circuit.

Government briefs filed in the *Cary* and *Peck* cases (in the Circuit Court) show the *New York Trust Co.* case was urged upon the Court as controlling.

Despite the fact that the Second Circuit had decided the *New York Trust Co.* case, which was affirmed by the Supreme Court, the Peck and Cary decisions of the Board of Tax Appeals (in favor of the taxpayer) were affirmed by the Second Circuit, per curiam, and without opinion.

Commissioner v. Cary, 91 Fed. (2d) 1009;
Commissioner v. Peck, 91 Fed. (2d) 1011.

If the Circuit Court of Appeals for the Second Circuit had felt that the *New York Trust Co.* case was even remotely applicable, we submit that the case would have been distinguished from the *Peck* and *Cary* cases in a written opinion.

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3. **CASES RECENTLY DECIDED SHOW THAT THE ORIGINAL RULING BY THE BUREAU OF INTERNAL REVENUE IN TREATING A LOSS OF THIS CHARACTER AS AN ORDINARY LOSS RATHER THAN AS A CAPITAL LOSS, WAS CORRECT.**

Respondent filed his Income Tax Return for the calendar year 1931 on March 15, 1932. (R. 26.)

At that time no cases had been decided by the Board or the Courts on the point involved herein.

However, there had been published in C. B. VII-2, p. 127, covering the July-December, 1928, period, an Income Tax Unit ruling known as I. T. 2443. (Infra p. 28.)

This ruling has to do with certain sections of the Revenue Act of 1926. It applies, however, to the Revenue Act of 1928, Section 101 (c) (8), infra p. 26; Section 113 (a) (11), infra p. 26; and Section 118, infra p. 27.

We quote from I. T. 2443, as follows:

> "With reference to the application of the capital gain and loss provisions of section 208 of the Revenue Act of 1926, it is noted that although the deduction of any loss is postponed in the case of such 'wash sales' until there is a disposition of the stock with no repurchase within the proscribed period, the stock in the case under consideration was not held for a period of more than two years. *During the period from the date of the 'wash sale' to the date of repurchase the taxpayer did not own or hold any stock. The two-year period in such case, for the purpose of the capital gain and loss provisions of section 208, accordingly runs from the date of the repurchase and not from the date of the original purchase.*" (Italics supplied.)

It is not disputed, of course, that the taxpayer in claiming an ordinary loss (represented by his *actual* loss) rather than a capital loss (represented by but 12½% of his actual loss) was following the rule as laid down by the Commissioner himself.

The rule remained in effect until late in 1934, when it was "modified" by I. T. 2832. See C. B. XIII-2, p. 201 (July-December, 1934, period, infra p. 30.) In announcing this modified ruling, reliance was placed upon the "reason-

ing'' of the United States Supreme Court in the *New York Trust Co.* case, supra.

This Supreme Court case was decided in May, 1934, and has already been discussed, supra.

The precise point involved herein was first decided by the Board of Tax Appeals in the *Heinz* case, 34 B. T. A. 885. We urge this Court to carefully read this opinion, regardless of the outcome of the appeal now pending before the Circuit Court of Appeals for the Third Circuit.

The opinion is well reasoned; it discusses the legislative history of the applicable sections of the Revenue Act of 1928, and prior Acts, and the House and Senate Committee Reports issued in relation thereto; it discusses the administrative practice prevailing for some years, and finally it discusses the Amendment to the Revenue Act of 1932 (Section 101 (c) (8) (D), infra p. 27), whereby the rule which the Commissioner seeks to have applied herein was incorporated in the Statute itself.

Following the *Heinz* case the Board rendered identical decisions in *Guy Cary v. Commissioner,* unreported, Memorandum Opinion, August 18, 1936; *Estate of Clara S. Peck, et al. v. Commissioner,* unreported, Memorandum Opinion, August 18, 1936 (see 34 B. T. A. 1308 and 1314), and *Lewis v. Commissioner,* 34 B. T. A. 996, decided on September 17, 1936.

As we have pointed out, the *Peck* and *Cary* cases were appealed to the Circuit Court of Appeals for the Second Circuit and affirmed without opinions.

Commissioner v. Cary, 91 Fed. (2d) 1009, Decided June 28, 1937;

Commissioner v. Peck, 91 Fed. (2d) 1011, Decided June 28, 1937.

The *Lewis* case, supra, is still on appeal to the Circuit Court of Appeals for the Second Circuit.

What is referred to in the Petitioner's Opening Brief as a "similar question" has been decided in favor of the Government in *Augustus v. Moore,* not officially reported, but found in 1937 C. C. H., Federal Tax Service, Vol. IV, par. 9400, decided by the District Court for the Northern District of Ohio, on June 12, 1937.

The opinion as reported in the Commerce Clearing House Service, supra, does not set forth the facts, nor does it refer to the *Heinz* or other cases decided by the Board, nor to the holdings of the Circuit Court of Appeals for the Second Circuit in the *Peck* and *Cary* cases, supra, nor does it make reference to the *New York Trust Co.* case, supra, upon which the Commissioner herein places such great reliance.

Summary of cases decided.

The Board of Tax Appeals has held in favor of the taxpayer in the *Heinz, Cary, Peck* and *Lewis* cases, and in the instant case.

The Circuit Court of Appeals for the Second Circuit has held in favor of the taxpayer in the *Peck* and *Cary* cases.

The *Lewis* case, decided in favor of the taxpayer by the Board is still on appeal to the Second Circuit.

The *Heinz* case, decided by the Board in favor of the taxpayer, is now on appeal to the Circuit Court of Appeals for the Third Circuit.

The District Court for the Northern District of Ohio has held in favor of the Government on what is referred to in the Petitioner's Brief herein as a "similar question". This case is now on appeal to the Sixth Circuit.

We submit that the Board decisions and the decisions of the Circuit Court of Appeals for the Second Circuit amply support I. T. 2443, which the taxpayer herein followed in making his return for the year 1931.

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4. **THE HOUSE AND SENATE COMMITTEE REPORTS ON PROPOSED CHANGES IN THE 1932 REVENUE ACT SHOW THE PROCEDURE ADOPTED BY THE TAXPAYER HEREIN WAS IN ACCORDANCE WITH THE PROVISIONS OF THE 1928 ACT, AND THAT IN ORDER TO CHANGE THE PREVAILING RULE, THE 1932 ACT HAD TO BE CHANGED.**

The exact situation dealt with in the instant case was considered by the House Committee on Ways and Means in considering changes in the proposed Revenue Bill of 1932. See this Report, infra, p. 31.

In the Report of the Committee it was pointed out that the 12½% limitation imposed by Section 101 (b) of the 1928 Act was easily avoided through the procedure adopted by the taxpayer herein. This procedure, let it be again stated, *was in accordance with the Commissioner's own ruling* in effect at the time.

The example stated by the Ways and Means Committee in its report was exactly the procedure adopted by the taxpayer herein.

The Senate Report is to the same effect (this Report is printed in full, infra p. 34). The statement in the Commissioner's Opening Brief (p. 15) and in the dis-

senting opinion of the Board in the *Heinz* case (34 B. T. A., 901) that the Senate Committee described the addition of subparagraph (D) to Sec. 101 (c) (8) to the 1932 Act is declaratory of the existing law are *incorrect.*

It was the amendment to Section 118 which the Senate Committee referred to as "declaratory"; and the same language regarding that amendment also appeared in the House Committee Report, as stated in the prevailing opinion of the Board.

The Board of Tax Appeals in the *Heinz* case, supra, says in relation to these reports (34 B. T. A., at 897, et seq.):

> "Meanwhile, the matter had come to the attention of the Congress in its consideration of the Revenue Bill of 1932. In the Report of the House Committee on Ways and Means (No. 708, 72d Cong., 1st sess., p. 16), the operation of the existing law under the Revenue Act of 1928 was fully recognized and a deliberate change was proposed. The Committee Report on this subject is quoted in full in the margin.
>
> The Report of the Senate Committee is also set out in the margin, and we think recognizes, no less than the House Report, the situation which was to be changed. The law was amended in the Revenue Act of 1932, by adding the following paragraph to section 101 (c) (8):
>
> '(D) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for

which he held the stock or securities the loss from sale or other disposition of which was not deductible.'

There can be no doubt, therefore, that from the time when the 1932 Revenue Act became law the composite loss from the first and second sales was to be treated as a capital loss if the period of the combined tenures of the original and of the newly purchased stock was two years or more. The Commissioner, however, treats paragraph (D), supra, of the 1932 Act as merely a clarifying provision of existing law. This is without foundation. It is a new provision. Congress might indeed have undertaken to make it retroactively effective to cover situations antedating its enactment, but it failed to do so. In the light of its unmistakable knowledge of the operation of the existing law, appearing from its Committee Reports, there can be no doubt that the failure to make the provision retroactive was deliberate. Neither the Commissioner nor the Board has power to change the effect of this deliberate choice of Congress by construing the provision of the 1932 Act as if it had been made retroactive. And this is likewise true of any present attempt by the Commissioner to make his present interpretation of the 1928 Act retroactive."

Petitioner, in his opening brief, page 15, says:

"However, as pointed out in the dissenting opinion in the *Heinz* case (34 B.T.A. 885, 901), the Senate Finance Committee had a different view as to the interpretation of the 1928 Act and as to the effect of adding subparagraph (D) to the 1932 Act. S. Rep. No. 665, 72d Cong., 1st Sess., pp. 22-23. The Senate Committee apparently thought that the new provision in the 1932 Act would be merely declaratory of the existing law—would be merely a clarification and not a change in the law."

But the *prevailing* opinion in the *Heinz* case (p. 898) says:

> "The Report of the Senate Committee is also set out in the margin, and we think recognizes, no less than the House Report, the situation which was to be changed."

It should be remembered that the provisions of the various Revenue Acts postponing the loss where repurchases of the same kind of property are made within thirty days before or after the sale, and restricting the loss to but 12½% of the actual loss if the property sold consists of "capital assets" (property held more than two years), are purely arbitrary. They should be construed strictly against the government.

We contend that the provisions of the 1928 Revenue Act in relation to the above matters are perfectly clear and free from ambiguity, but if it should be thought that the statute is doubtful, still the taxpayer is entitled to a decision in his favor. As was said in *McFeely v. Commissioner,* 296 U. S. 102, at 111:

> "Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer."

It was also argued by petitioner (Opening Brief, p. 8) that the treatment of the two holdings for the purpose of fixing the base requires a similar treatment for the purpose of fixing the rate, *in the interest of harmony and consistency.*

This same argument was used in the *Heinz* case. The Board answered it as follows (34 B. T. A. 896):

"Because of the disallowance of the loss deduction on the wash sale, it is contended that the taxpayer's tenure of the new and entirely distinct property should, despite the intervening lapse, be tacked to the tenure of his old, in order to establish the rate, regardless of the fact that if the result of the original sale had been a gain, his two periods would not have been tacked. Congress may conceivably tack the same taxpayer's tenures of different pieces of property for tax purposes as it does the tenures of the same property held by successive taxpayers, but, in the absence of a clear indication of intention to do so, there must be some logical necessity for adopting a construction contrary to the plain words of the statute. *No such logical compulsion exists here, for the result sought by the Commissioner would lack the very balance and harmony which is said to be its justification.* The wash sale provision and its dependent provision, changing the base of property coming within its terms, is too narrow in its intent and effect to be extended by implication." (Italics supplied.)

The argument was also made in the case of *McFeely v. Commissioner,* supra, but the Supreme Court replied as follows (296 U. S., at p. 111):

"To depart from the literal meaning of Sec. 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section *in an effort to bring about a uniformity which it is claimed Congress intended but failed to express.*" (Italics supplied.)

There is also a very interesting statement along this line by Mr. Justice Roberts, in a *dissenting* opinion in *Helvering v. New York Trust Co.* (See 292 U. S. 455, at 471):

> "Assuming however, for the sake of argument, that there is a logical inconsistency between the prescribed method for arriving at the base and that for ascertaining the rate, it is the province of Congress alone to remove it. There is no abstract justice in any system of taxation. Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed general policy. Such a principle of decision would embark us on a sea of construction whose bounds it is difficult to envisage. Every revenue act embodies policies which conflict to some extent with those elsewhere in the Act evinced. Income tax legislation is a continuous series of corrections and amendments in an effort to make the policy of taxation more congruous.
>
> The very sections extending the relief of a reduced rate on capital gains, teach us how inconsistently the principle has been followed and how impossible and improper it would be for a court to rewrite the sections in an effort to make them logically consistent."

CONCLUSION.

We submit the taxpayer properly claimed the loss in question as an ordinary loss rather than as a capital loss.

This was in accordance with the ruling of the Commissioner in effect at the time the return was filed, which rule remained in effect until late in 1934. (I. T. 2443.)

The correctness of the Commissioner's rule has been upheld by the Board of Tax Appeals and by the Circuit Court of Appeals for the Second Circuit.

That the Commissioner had correctly interpreted the law as shown by I. T. 2443 is further evidenced by the House and Senate Reports in connection with the proposed 1932 Revenue Act.

The addition to the 1932 Act (Section 101 (c) (8) (D)) is clearly a change in the law and not merely a clarification thereof.

The Board's decision should be affirmed.

Dated, San Francisco,
January 17, 1938.

Respectfully submitted,

J. PAUL MILLER,

Attorney for Respondent.

(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1928, c. 852, 45 Stat. 791.

Sec. 101. Capital Net Gains and Losses.

(a) Tax in case of capital net gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be at this amount plus 12½ per centum of the capital net gain.

(b) Tax in case of capital net loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title——

* * * * * * *

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

* * * * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *

Sec. 113. Basis for Determining Gain or Loss.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that——

* * * * * * *

(11) Wash Sales of Stock.—If substantially identical property was acquired after December 31, 1920, in place of stock or securities which were sold or disposed of and in respect of which loss was not allowed as a deduction under section 118 of this Act, or under section 214 (a) (5) or 234 (a) (4) of the Revenue Act of 1921, the Revenue Act of 1924, or the Revenue Act of 1926, the basis in the case of the property so acquired shall be the basis in the case of the stock or

securities so sold or disposed of, except that if the repurchase price was in excess of the sale price such basis shall be increased in the amount of the difference, or if the repurchase price was less than the sale price such basis shall be decreased in the amount of the difference;

* * * * * * *

Sec. 118. Loss on Sale of Stock or Securities.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

Revenue Act of 1932, c. 209, 47 Stat. 169.

Sec. 101 (c) (8) (D):

In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act

or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

I. T. 2443 C. B. VII-2, p. 127.

SECTION 214 (a) 4, 5, 6—DEDUCTIONS ALLOWED INDIVIDUALS: LOSSES.

Article 146: Losses from the sale and repurchase of securities. VII-50-4031 I. T. 2443

(Also Section 208, Article 1651.)

REVENUE ACT OF 1926.

In the case of "wash sales" of stock, the deduction of any loss sustained is to be postponed until the stock is disposed of and not repurchased within the proscribed period of time, and it is immaterial whether the adjustment of basis be made on the original basis or on the repurchase price.

The two-year period provided by Section 208 of the Revenue Act of 1926 runs from the date of the repurchase, in the case of "wash sales", and not from the date of the original purchase.

(G. C. M. 1210, C. B. VI-2, 60, amplified.)

Information is desired relative to the interpretation placed on Article 1601 of Regulations 69 and Section 204(a) 11 of the Revenue Act of 1926 pertaining to "wash sales" of stock by General Counsel's Memorandum 1210. Attention is called to the fact that the regulations provide for determining the adjusted basis on which to compute

the gain or loss resulting from the final sale by increasing or decreasing the original basis by the difference between the price at which the "wash sale" was made and the repurchase price whereas the memorandum in question provides that such adjusted basis may be arrived at by increasing the repurchase price by the amount of the indicated loss on the "wash sale".

While the statute and regulations provide that such adjusted basis is to be determined by increasing or decreasing the original basis by the difference between the price at which the "wash sale" is made and the repurchase price, the object or purpose is to postpone the deduction of any loss until the stock is disposed of and not repurchased within the proscribed period of time, and it is therefore immaterial whether the adjustment be made on the original basis or on the repurchase price, as the result is the same in either case. The memorandum in question, by way of summary, merely states that the indicated loss on the "wash sale" may be added to the repurchase price in arriving at such adjusted basis. With reference to the application of the capital gain and loss provisions of Section 208 of the Revenue Act of 1926, it is noted that although the deduction of any loss is postponed in the case of such "wash sales" until there is a disposition of the stock with no repurchase within the proscribed period, the stock in the case under consideration was not held for a period of more than two years. During the period from the date of the "wash sale" to the date of repurchase the taxpayer did not own or hold any stock. The two-year period in such case, for the purpose of the capital gain and loss provisions of Section 208, accordingly runs from

the date of the repurchase and not from the date of the original purchase.

I. T. 2832 C. B. XIII-2, p. 201.

SECTION 101. CAPITAL NET GAINS AND LOSSES.

Article 501: Definition and illustration of capital net gain. XIII-49-7164 I. T. 2832

REVENUE ACT OF 1928 and PRIOR REVENUE ACTS.

In the case of "wash sales" the two-year period during which property must be held to constitute "capital assets" within the meaning of Section 101 of the Revenue Act of 1928 and the corresponding provisions of prior Revenue Acts runs from the date of the acquisition of the original securities and not from the date of repurchase.

I. T. 2443 (C. B. VII-2, 127) is modified accordingly.

I. T. 2443 holds in part as follows:

The two-year period provided by Section 208 of the Revenue Act of 1926 runs from the date of the repurchase, in the case of "wash sales", and not from the date of the original purchase.

Under the Revenue Act of 1928 and corresponding provisions of prior Revenue Acts, where securities held for more than two years are sold, substantially identical securities are acquired within a period of 30 days (resulting in a "wash sale" under Section 118 of the Revenue Act of 1928), and a second sale of the securities is made within the two-year period after the repurchase, the two-year period during which the property must be held to constitute "capital assets" within the meaning of Section 101 of the Revenue Act of 1928, and the corresponding pro-

visions of prior Revenue Acts runs from the date of acquisition of the original securities, and not from the date of repurchase. Any loss sustained from the sale of the repurchased securities should be treated as a capital loss. I. T. 2443 is modified accordingly. (See generally the reasoning contained in the decision of the United States Supreme Court in Helvering v. New York Trust Co., Trustee (Conrad Henry Matthiessen), 292 U. S. 455, Ct. D. 840, C. B. XIII-1, 188.)

Report of the House Committee on Ways and Means No. 708, 72nd Congress, 1st Sess., p. 16 (in relation to changes in the proposed Revenue Bill of 1932).

Sections 101 (c) (8), 113 (a) (11), and 118.

Wash Sales.

The 12½ per centum limitation imposed by section 101 (b) of the 1928 act upon losses from the sale of property held for more than two years, is easily avoided in the case of stock or securities. A taxpayer, desirous of taking a loss on stock which he has held for more than two years, would sell the stock, "repurchase" it within 30 days, and then sell the repurchased stock. The loss on the first sale (the "wash" sale) would not, by reason of section 118, be allowed as a deduction, but the repurchased stock would have substantially the high basis of the stock sold (under section 113 (a) (11)). Since the repurchased stock would not have been held for more than two years when sold, the loss on its sale would not be a "capital loss" but an "ordinary deduction" allowable without limitation. Thus the taxpayer would end in virtually the same financial position as if he had made an outright sale in the first instance but would escape the

limitation under section 101 (b) which would have applied if he had made an outright sale.

For example, A bought stock in 1927 for $100,000, which stock was worth $50,000 in 1931. In November, 1931, A sold his stock for $50,000 and repurchased identical stock within thirty days for the same amount. By reason of section 118 of the present law, A is denied a deduction for the $50,000 loss, and under section 113 (a) (11) of the present law, his new stock takes $100,000 as its basis. Thereafter, A again sold the repurchased stock for $50,000. A is entitled under the present law to deduct a loss of $50,000 from his gross income and is not subjected to the 12½ per centum limitation to which he would be restricted under section 101 (b) of the present law had he simply sold his original stock.

Such anomalous results are precluded by subparagraph (D) of section 101 (c) (8) of the new bill, which requires the taxpayer to add to the period for which he has held the stock or securities purchased in connection with a "wash" sale, the period for which he had held the stock or securities sold. Under the proposed bill in the above example A would be subject to the 12½ per centum limitation on its loss.

In many cases of "wash" sales the shares disposed of in the "wash" sale have been purchased at different times and at different prices, or the shares repurchased in connection with the sale are subsequently sold at different times and at different prices, or the number of shares repurchased are greater or less than the number of shares sold. In all such cases some allocation as between the shares sold and the shares repurchased is absolutely es-

sential in order to apply the new "tacking" provision included in section 101 (c) (8); and such allocation is, in fact, equally desirable in determining the amount of the loss to be disallowed in the "wash" sale and the basis for computing future gain or loss on the shares repurchased in connection with the "wash" sale. In the prior act it was assumed that such identification or allocation was unnecessary or, if necessary, could readily be made. In the types of cases mentioned above an accurate allocation is often impossible, and resort must be had to some rule of thumb. As it would be impracticable to state in the act a rule of uniform application to all the possible types of cases, it is provided in subsections (b) and (c) of section 118 that such allocation shall be made under rules and regulations to be prescribed by the commissioner. The allocation so made will, of course, be applicable not only for the purpose of section 118 but also for the purpose of sections 101 (c) (8) and 113 (a) (11). In view of this new provision the last sentence of section 118 of the 1928 act has been eliminated.

Section 118 has been amended to show clearly that the wash sale provisions apply to sales and repurchases occurring on the same day; this change is regarded as declaratory of the existing law and is made in the interest of clarity only. The section has also been amended to make it clear that it applies only to cases of the acquisition of substantially identical stock or securities by purchase or through a taxable exchange on which the gain or loss was fully recognized; the result of the amendment is to eliminate any possibility of a conflict between section 113 (a) (11) and other basis provisions of the

law. Other changes in the language of sections 113 (a) (11) and 118 are for clarification only.

Senate Report No. 665, 72nd Congress, 1st Session (in relation to changes in the proposed Revenue Bill of 1932).

Sections 101 (c) (8) (D), 113 (a) (11), and 118.

Wash Sales.

Section 101 (c) (8) of the existing law recognizes that in certain cases where the gain or loss basis of old property carries over, in whole or in part, to newly acquired property, the newly acquired property is regarded as taking the place of the old property and the two are regarded as the same property for the purpose of determining the period the property was held. The existing law does not specifically cover the cases of property acquired in connection with a wash sale, although no loss from such sale was recognized under section 118 and the basis of the old property is carried over in whole or in part under section 113 (a) (11) to the new property. Your committee sees no reason why property acquired under these circumstances should not be accorded the same treatment as is accorded in other similar cases. Accordingly, a new subparagraph (D), added to section 101 (c) (8) by the House bill, is concurred in by your committee.

In many cases of "wash" sales the shares disposed of in the "wash" sale have been purchased at different times and at different prices, or the shares repurchased in connection with the sale are subsequently sold at different times and at different prices, or the number of shares repurchased are greater or less than the number of shares sold. In all such cases some allocation as between the shares sold and the shares repurchased is abso-

lutely essential in order to apply the new "tacking" provision included in section 101 (c) (8); and such allocation is, in fact, equally desirable in determining the amount of the loss to be disallowed on the "wash" sale and the basis for computing future gain or loss on the shares repurchased in connection with the "wash" sale. In the prior act it was assumed that such identification or allocation was unnecessary or, if necessary, could readily be made. In the types of cases mentioned above an accurate allocation is often impossible, and resort must be had to some rule of thumb. As it would be impracticable to state in the act a rule of uniform application to all the possible types of cases, it is provided in subsections (b) and (c) of section 118 that such allocation shall be made under rules and regulations to be prescribed by the commissioner. The allocation so made will, of course, be applicable not only for the purpose of section 118 but also for the purposes of section 101 (c) (8) and 113 (a) (11). In view of this new provision the last sentence of section 118 of the 1928 act has been eliminated.

Section 118 has been amended to show clearly that the wash sale provisions apply to sales and repurchases occurring on the same day; this change is regarded as declaratory of the existing law and is made in the interest of clarity only. The section has also been amended to make it clear that it applies only to cases of the acquisition of substantially identical stock or securities by purchase or through a taxable exchange on which the gain or loss was fully recognized; the result of the amendment is to eliminate any possibility of a conflict between section 113 (a) (11) and other basic provisions of the law. Other changes in the language of sections 113 (a) (11) and 118 are for clarification only.